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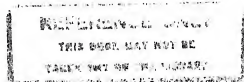
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REVIEW OF FINANCIAL CONDITIONS FOR LEGAL AID
ELIGIBILITY FOR CIVIL LEGAL AID

INTRODUCTION

1. In November 1989, the Lord Chancellor announced the Government's intention to conduct a general review of all the financial conditions for the grant of legal aid. The review would "look at all aspects of the financial conditions, including the upper (eligibility) limit, the lower (free) limit, the amount of contribution payable and the statutory charge, as well as the machinery for assessing means and enforcing the payment of contributions [It would] explore the possibility of examining individual applicants' means in relation to the likely cost of different kinds of proceeding, [and would] consider the availability of legal expenses insurance and the position of those who proceed without legal aid."

2. The legal aid systems in Scotland and in England and Wales are broadly similar and in announcing the review, the Government indicated that it would cover questions of equal application to Scotland. This paper, which is being issued for consultation in Scotland, therefore covers many of the issues set out in the consultation paper published by the Lord Chancellor's Department for England and Wales on 4 June.

3. Equally, the Scottish legal aid system is based on a separate statutory framework and there are differences in the detailed arrangements operating in Scotland, reflecting in part the different legal system north of the border. This paper takes account of these differences in the Scottish legal and legal aid systems.

4. The review of legal aid is being undertaken in stages. The first stage, dealt with in this paper, concentrates on non-matrimonial civil legal aid¹. Future stages will look at legal aid for criminal proceedings and for matrimonial and other family cases, together with the Legal Advice and Assistance scheme and the operation of the statutory charge. Consultation papers covering these later stages will be issued in due course.

5. This consultation paper sets out the Government's provisional thinking about non-matrimonial civil legal aid in Scotland. Chapter 1 sets legal aid in the context of the legal system as a whole and outlines the way civil legal aid currently operates. Chapter 2 identifies affordability as a key issue for both the individual litigant and the taxpayer. It emphasises that lawyers have a responsibility for providing the legal services required at a price that can be afforded and that legal aid must be properly targeted to need. The latter requires consideration not only of the means of applicants but also of the cost they face, the problems created by uncertainty about the likely cost of the case and the alternative sources of funding available to them.

6. The second part of the paper looks at alternatives to publicly funded legal aid. Chapter 3 discusses a number of alternatives, including contingency fees, loans and state subsidised insurance. Chapter 4 considers legal expenses insurance and concludes that it has considerable potential both by itself and in conjunction with state legal aid. Chapter 5 describes the operation of a contingency legal aid fund which covers the expenses of unsuccessful parties from a percentage of the damages obtained by successful parties (and from fixed fees) and which could extend the provision of legal assistance at no net cost to the taxpayer.

7. Part III of the paper considers various options for change. Chapter 6 looks at a number of possible improvements within the existing

¹Matrimonial civil legal aid represents actions relating to divorce, separation, aliment, husband and wife miscellaneous, custody and parent and child miscellaneous categories. Non-matrimonial civil legal aid represents actions relating to affiliation and aliment, adoption, reparation, diligence and other cases.

civil legal aid system in Scotland, including simplified means assessment and the way contributions are calculated. Chapter 7 looks at more radical approaches, including a "safety net" scheme under which litigants would fund their cases privately up to an individually assessed spending limit beyond which they would become eligible for legal aid. This would extend legal aid to some of those now ineligible but who may face high expenses, while excluding those who do not require assistance. Such a scheme is described in more detail in Chapter 8.

8. The Secretary of State invites comments from interested parties on any of the issues raised by this paper and particularly on the questions discussed in the Conclusion. Responses should be sent, by 31 October 1991, to

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Additional copies of this paper, at a cost of £2 each, can be obtained from Andrew Inglis at the same address (Tel: 031-244 2200).

9. Copies of responses will be made available on request to the public unless respondents specify otherwise, in which case confidentiality will be strictly respected.

PART I: CONTEXT AND ISSUES

Chapter One

LEGAL AID AND THE LEGAL SYSTEM

Context of the review

1. The review considers the cost effective provision of legal aid in Scotland in the wider context of the provision of legal services in general and the legal system as a whole. It represents one part of an ongoing process of reform which has in recent years brought about various improvements in civil court procedures aimed at reducing the delay and complexity of proceedings, such as those for actions of reparation and personal injuries, and major changes in the activities of the legal profession under Part II of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. In particular the 1990 Act aims to widen choice in the provision of legal services.
2. The courts in Scotland are based on an adversarial system, that is the parties and not the court are responsible for formulating their cases, gathering the evidence to support them and presenting them to the court. As a result, skilled help is likely to be needed in most of the cases presently covered by legal aid; indeed, without lawyers, the courts as currently organised could not properly function.
3. In recent years there has been a recognition that in some areas of civil law the adversarial system need not be the only, or indeed the most suitable, means of settling disputes. Consideration will continue to be given to areas where it may be appropriate to develop alternative ways of resolving issues and providing legal services, including
 - a. the wider use of non-adversarial methods of dispute resolution, particularly in matrimonial matters. Some moves in this direction have already taken place, notably the development of family conciliation as an aid to settling disputes on divorce;
 - b. the possibility of a no-fault compensation scheme for minor road traffic injuries;

c. the possible extension of procedures, such as small claims, which are intended to enable parties to conduct their own cases without legal representation;

d. the possible further development of tribunals for the settlement of disputes.

4. Legal advice and representation is, however, likely to remain necessary for those pursuing or defending legal rights in most types of civil and criminal cases. The conditions on which legal aid is granted may quite properly vary according to the type of proceedings involved. The current absence of formal financial conditions for criminal legal aid in Scotland, for example, recognises the special considerations which apply to an accused person who has no choice but to be a party to proceedings which may have very serious consequences for him. The rather different factors which may apply in civil cases are considered in Chapter 2.

5. There are, however, other approaches, apart from subsidy by the taxpayer, to funding the cost of legal services. The review will consider alternative sources of funding which might be available to assist some potential litigants without recourse to the public purse. Nevertheless, legal aid to pay for the services of lawyers is likely to remain the only solution for those who can afford to pay nothing themselves.

Civil legal aid

6. The rest of this paper is concerned with non-matrimonial civil proceedings. A brief outline of the current scheme for civil legal aid is set out below. Fuller details can be found in the Guide to Legal Aid in Scotland, issued by the Scottish Legal Aid Board.

7. Civil legal aid is available for representation in court proceedings and for steps preliminary or incidental to those proceedings. The legal aid scheme in Scotland is administered by the Scottish Legal Aid Board (SLAB), subject to the guidance of the Secretary of State, under the provisions of the Legal Aid (Scotland) Act 1986, and the Scottish Civil Legal Aid Regulations.

8. Applications for legal aid are made through a solicitor to the Scottish Legal Aid Board. An applicant must satisfy the Scottish Legal Aid Board that he has probable cause and that it is reasonable to grant legal aid in the circumstances of the case (the merits test). He must also qualify financially. Assessment of the applicant's means is carried out by the Scottish Legal Aid Board. The purpose is to determine whether an applicant's disposable income and capital fall within the financial eligibility limits for the grant of legal aid, and assess the contribution, if any, which is payable in respect of either. About 80% of those granted legal aid certificates are not required to pay a contribution.

9. If an assisted party is successful and his expenses are recovered in full from his opponent, he will have to pay nothing and any contribution will be refunded to him. If expenses are not recovered in full, the contribution can be retained to cover the deficit, and any further deficit may be made good from any money or property recovered or preserved in the proceedings (the statutory charge).

10. Under section 18 of the Legal Aid (Scotland) Act 1986, an unsuccessful assisted party may be liable for his opponent's expenses, but only up to the amount, if any, which it is reasonable for him to pay in all the circumstances. Section 19 of the 1986 Act provides for an unassisted party's expenses to be paid from the legal aid fund, but only where he was the defender and would otherwise suffer financial hardship.

CIVIL LEGAL AID: AFFORDABILITY

Introduction

1. The review is being conducted against a background of rising demand for civil legal aid and rising expenditure¹. In Scotland in the five years 1985/86 - 1989/90 the number of non-matrimonial civil legal aid certificates issued increased by 22% and gross expenditure rose by 62% from £1.9 million to £4.9 million. Despite the increase in total costs, the average cost of non-matrimonial civil legal aid cases in Scotland has fluctuated considerably over the same period². The reasons for this are unclear: factors are likely to include the total number of certificates issued in any one particular year, variations in types of cases from year to year and the controls exercised by the Scottish Legal Aid Board.

2. Nevertheless despite increases in volume and expenditure, there is concern that under the present eligibility system potential litigants are being denied access to justice. This concern is frequently expressed in terms of the number of individuals whose resources take them outside legal aid eligibility limits. A related concern is that at any level of means a fixed eligibility limit will exclude people whose means are at best moderate in relation to the costs they may face and who therefore fall into an "eligibility gap". Annex C reports on a survey of applications for legal aid which were abandoned or refused and subsequent action taken by the applicants.

3. In the absence of financial help, high cost can be an absolute barrier to those with very limited resources. Others will be able to proceed with a greater or lesser degree of financial sacrifice. Whether they choose to make this sacrifice should largely depend on the

¹Detailed information is contained in Annex A.

²Average costs:

1985-86	£1,136
1986-87	£ 945
1987-88	£1,222
1988-89	£ 855
1989-90	£ 934

See also Annex A.

importance to them of the issue at stake. Some may be deterred, however, from proceeding simply by fear or uncertainty about the level and incidence of cost, rather than by an absolute figure. This is discussed in more detail at paragraphs 11-14 below.

4. Fear of cost leads to demands for ever-increasing eligibility limits. At the same time the rising cost of the total legal aid bill means that there is less money to pay for this and places pressure on the Government's expenditure programme as a whole. This emphasises that affordability is also a problem, although in a rather different form, from the point of view of the taxpayer.

5. A key issue for the review is therefore affordability as seen from the points of view of individual litigants and of the taxpayer. Any solution must ensure that litigation is affordable and that legal aid is limited to those who need it.

Expenses

6. Unlike other state benefits, the grant of legal aid can also affect a third party, the opponent. Sections 18 and 19 of the Legal aid (Scotland) Act 1986 involve a derogation from the normal rule that "expenses follow success". Section 18 protects the assisted person from expenses he would not be able to afford and section 19 limits the potential liability of the legal aid fund for the expenses of unsuccessful cases which it has supported. The grant of legal aid can therefore significantly disadvantage the opponent who may feel compelled to concede what he may consider to be a strong case rather than risk facing substantial expenses even if he is successful. This underlines the importance of ensuring that legal aid and the protection it entails are only available where they are needed and for meritorious cases.

The need for legal aid

7. In public debate, the availability of legal aid appears to have become synonymous with "access to justice". Legal aid is seen as virtually the only recourse for individuals seeking to litigate and its absence as justice denied. In practice, the importance of enforcing a particular legal right could vary considerably and the wide variety of cases and circumstances

makes it difficult to assess either the worth or importance of the individual cases for which assistance is sought, or the appropriate priority for public expenditure on civil legal aid in general.

8. The legal aid merits test assesses the reasonableness of individual cases in a legal sense and, to a very limited extent, a practical one, considering for example whether the opponent has the means of paying a sum awarded under a decree. It makes virtually no attempt to assess the importance of the case to the applicant. By contrast, private litigants, suitably informed of all the risks involved, are in a position to make judgments about the importance to them of their case. Chapter 6 therefore suggests that, so far as those who can afford to pay something towards litigation are concerned, there is scope for greater emphasis on the contributory system in encouraging litigants to attach a realistic priority to the pursuit of legal remedies.

9. So far as the overall provision of civil legal aid is concerned, it has been suggested that effectiveness of cover should be judged by the maintenance of a particular percentage of the population within the scheme. This approach is unsatisfactory for several reasons:

a. it does not target need because it does not relate means to cost;

b. it presupposes that the distribution and level of means in the population remains constant relative to the cost of litigation;

c. it sees legal aid as the only means of funding the litigation of those who cannot afford to fund it themselves. Chapter 3 discusses some of the alternatives to legal aid which individuals can use to fund litigation.

10. This paper therefore adopts a different approach to eligibility. It emphasises the need of the prospective litigant for assistance in meeting the cost or overcoming the fear of cost of legal services. Eligibility should depend on the available means of individual applicants in relation to the costs which they face.

The cost of litigation

11. It would appear that in general the cost of a civil case in Scotland is not as high as people may fear. In a survey of 370 cases paid by the Scottish Legal Aid Board in October 1990, the gross legal aid costs of the assisted party were less than £1,000 in 75% of the cases and under £500 in 60% (see Annex B). These are not inconsiderable sums and unassisted litigants could face somewhat higher charges. Nevertheless, costs would not seem as high as may generally be feared.

12. Uncertainty about the cost of legal services can arise in a number of ways:

a. although most cases are not hugely expensive, there is no absolute guarantee that what starts as a moderate-sized case will not turn into a much larger and more expensive one. There is no limit in advance to the ultimate bill.

b. since it is customary for the loser to pay the winner's reasonable expenses as well as his own, much depends on the outcome of the litigation.

c. it is often difficult for potential litigants to obtain from their solicitors a clear indication of the likely cost of taking their case to court. Solicitors are not required to disclose their charges and although Law Society of Scotland Rules now permit the advertising of charges, the practice is not widespread for court work. This makes it difficult for clients to compare the prices and services offered by different lawyers. Recent reforms due to come into effect later this year may, however, stimulate written fee arrangements between solicitor and client since the existence of such an agreement will be a precondition for solicitors to recover their fees in any court action without having to have it assessed by an auditor of court.

13. The antidote to uncertainty is clear and reliable professional advice about prospects of success and likely duration and cost of the case. Litigation will always hold some scope for surprises but this should not prevent solicitors making a reasonable prediction of the outcome or an indication of the likely scale of the cost of a case. A competent lawyer

should be able to make reasonably accurate forecasts over the broad run of cases.

14. To summarise, need can be addressed in a number of ways. Direct financial support for the cost of obtaining legal services will be needed in many cases. For others contingent support may sometimes be more appropriate depending on a litigant's means and the likely case cost. More generally, it will be important to reduce the deterrent effect of uncertainty and ensure that litigation is affordable. In both these respects, the quality and reliability of the legal services provided will be critical.

Efficiency and the Control of Case Cost

15. While the cost of most cases may not be as high as is feared, nevertheless litigation under an adversarial system is a resource intensive process. Control of cost is vital regardless of whether a case is to be funded privately, through legal aid or by some other means. It is important for legal aid in order to ensure value for money in a publicly funded, demand-led system. Whatever the source of funding, there is a responsibility on the legal profession to provide legal services efficiently and effectively.

16. In a perfect market, competition would regulate prices and encourage efficiency. In practice there are a number of factors which distort this. A major continuing problem for private litigants is lack of the knowledge and information, for example, about likely case cost or even lawyers' fees, which would enable them to demand quality and value for money. Alongside this, the involvement of lawyers in other lucrative types of work is likely to force up the price for litigation. This creates pressure for higher eligibility limits and for increased legal aid fees.

17. While the onus for achieving improvements in efficiency rests primarily on the legal profession, both the Government and the Scottish Legal Aid Board have an important part to play in providing an appropriate framework. The Government's ongoing process of reform referred to in Chapter 1 is designed to fulfil this.



18. A major barrier to the improvement of quality and efficiency may lie in the distribution of legally aided work. At present, any solicitor who is willing to do so may take legal aid cases. It would appear that a substantial proportion of legal aid work is distributed among a large number of solicitors firms and that a large number of solicitors are each handling quite small numbers of legal aid cases. This raises the question whether there is sufficient concentration to maximise efficiency. Firms handling relatively small volumes of litigation may be less geared up to do it as efficiently as those whose turnover allows them to develop expertise, install appropriate support systems and take advantage of economies of scale.

Franchising

19. The Legal Aid Board in England and Wales is currently developing proposals to concentrate legal aid work in the hands of "franchised" solicitors' firms and advice agencies. Franchising involves identifying solicitors who can satisfy clear criteria of reliability, efficiency and competence. The resulting quality assurance would make it possible to assist franchisees by freeing them from some of the administrative restrictions currently associated with legal aid.

20. While the situation in Scotland is somewhat different, many of the advantages in terms of quality of service and value for money which a franchise system might provide could also apply in Scotland. The Government is therefore closely monitoring the development of the Legal Aid Board's proposals.

Controls

21. More immediately, consideration is being given to the development of systems for monitoring the progress of cases and the build-up of costs and for the quicker payment of lawyers' legal aid accounts. Day to day control over legal aid expenditure is the responsibility of the Scottish Legal Aid Board. The Board is a single agency with responsibility for determining legal aid applications (apart from solemn criminal applications and certain other applications under the Social Work (Scotland) Act 1968) and for scrutinising and paying legal aid accounts. Scottish legal aid fees paid to lawyers are based on specific tasks undertaken and this

allows the Board to exercise a reasonable measure of control over individual accounts. Under the arrangements presently in force, however, once a case has passed the merits test, the Board does not have the opportunity to exercise control over its progress. Cost is assessed only at the end of a case when it may be difficult to assess the value or need of the work which has been done or indeed to refuse or adjust payment to any significant degree. The system can also impose financial burdens on lawyers, particularly in lengthier civil legal aid cases. The recent introduction of a Payment to Account Scheme (whereby an interim payment is made after 2 years in lengthier cases) was aimed at reducing this burden. The uptake has not, however, been high and this matter remains a significant source of dissatisfaction on the part of the legal profession in Scotland.

22. Consideration is being given to devising possible enhancements to the Payment to Account Scheme, including a system which will provide payments on account on the satisfactory completion of discrete stages of a case. For its part, the Law Society of Scotland has proposed a Stage Payment Scheme on the above lines to replace the Payment to Account Scheme. This would provide earlier payments to civil legal aid practitioners than is currently possible. It might also enable the Scottish Legal Aid Board to monitor the progress of civil cases and the build-up of expenditure.

Summary

23. A key issue is affordability. Cost can act as a barrier to private litigants, thus increasing pressure for wider eligibility. Rising expenditure on legal aid increases the burden on the taxpayer. Eligibility for legal aid must be clearly targeted to need in the light of the costs facing the litigant, his ability to pay and the alternative sources of funding available.

24. If the taxpayer is to fund wider eligibility, it will be vital to secure demonstrable value for the public money spent. Every effort must be made to make legal aid affordable. This in turn demands continuing improvements in the efficient provision of legal services.

Chapter Three

OTHER METHODS OF FUNDING

1. State-funded legal aid is not the only means of financing litigation. Indeed, it has generally been accepted that there would always be a proportion of the population which would not be eligible for legal aid and would have to fund any litigation by other means. This chapter looks at a number of alternatives, some of which already exist, and considers whether any of them could replace legal aid in appropriate circumstances.

2. There seem to be three basic alternatives to legal aid at present. The first is to fund the case privately from the litigant's own resources. Many individuals can afford to litigate, subject to a greater or lesser degree of financial sacrifice. Others could do so by borrowing the money (see paragraphs 3-11 below). Second, there is the possibility of contingency funding (see paras 12-15 below and Chapter 5): indeed some cases in Scotland may have already proceeded as speculative actions whereby lawyers may agree to act on the basis that they will only be paid in the event of success resulting in the recovery of expenses from the opponent. The third broad alternative is insurance. Private legal expenses insurance is discussed in detail in Chapter 4 while paragraphs 14-15 below consider a state-subsidised scheme. Finally, backing for litigation may be available through membership of some other body, such as a Trades Union or motoring organisation. (See paragraphs 16-19 below).

Loans

3. It is, of course, already open to prospective litigants to make use of credit to fund their cases. The question arises whether the wider use of loans could be encouraged. This might be done by the development of a specialised scheme offering loans for litigation purposes or by taking account of credit in the financial conditions for legal aid.

Litigation lending scheme

4. A number of Australian banks and financial institutions operate litigation lending schemes, mainly directed at those who are ineligible for

legal aid. The main areas in which they appear to be used are family law and business partnership disputes. The schemes all take the form of an arrangement between the bank and individual legal firms whereby loans can be made to clients of the latter. The loans are usually of a fixed amount at a higher than normal rate of interest. In some schemes, it is the solicitor rather than the client who can draw down the money which is used to cover disbursements or interim fees. The schemes place a considerable onus on the lawyer who is responsible for checking both the merits of the case and the financial status of the litigant and is liable for the loan if the client is unable to repay it.

5. A number of questions have been raised about the legal ethics of these litigation lending schemes. In New South Wales, for example, the Law Society has felt the need to revise its practice rules to regulate their use. The main concerns are the possible conflict of interest created by the business relationship between the lawyer and the lender, and the client's lack of control in some of the schemes over how the money is spent. Furthermore, a number of the financial institutions have begun to review the economic viability of their schemes.

6. In 1990, The Law Society of England and Wales considered the possibility of designing a standard litigation loan package. The client, not the solicitor, would be the borrower, but the latter would certify the merits of the case and report on progress to the bank from time to time. However, a number of problems emerged. The banks were concerned about the high start-up costs of a scheme, including the cost of specialised systems and training. This contrasted with what seemed a relatively small market, with limited opportunities for cross-selling. Individual loans would have high transaction costs, especially if the client was not an existing customer. Finally, there was concern about the delay in the drawdown of the loan, normally required within one month. This increased the risk of a material change in the borrower's financial status. A litigation loan scheme would therefore not appear to be a viable proposition.

Credit and legal aid

7. Currently, the only form of credit taken into account by legal aid means assessment is the loan values of life assurance policies. This is a

relatively minor factor in practice. It is also arguably inequitable since only policies to which insurance companies assign a value, a declining proportion, are taken into account.

8. It would be possible to take greater account of credit in one of two ways. Both approaches would apply equally to a loan from a specialised litigation scheme, a secured loan, for example on the litigant's house, or any unsecured credit available to the applicant. The first possibility would be to incorporate a notional sum representing potential credit into the eligibility calculation. This has the following drawbacks:

i. some potential litigants would not be able to obtain credit. The grant of a loan is a commercial decision for the lending institution which would depend on the creditworthiness of the applicant. This is not simply related to wealth. Past performance as a borrower may be as much a factor as current circumstances and capacity to pay.

ii. in some cases, the cost would outstrip the size of any available loan.

iii. litigants would not know how much they would need to borrow or whether they would be able to repay the loan from damages. Some would be deterred. Others could be left with substantial debts.

9. The alternative approach would be to consider the loans that an individual applicant could actually raise. The creditworthy would pay higher contributions or become ineligible. However, where credit took applicants above a fixed limit, there would remain cases where the cost outstripped the loan.

10. Under this approach, it would be necessary to require each applicant to show that they had raised whatever loans they could and to include these as capital. It would be difficult, however, to investigate whether applicants had fully explored their credit potential, so the system could be complex to administer. It would also arguably penalise the thrifty.

11. It would be simpler to bring possible secured loans to account because the borrowing potential could be more readily identified. The

same arguments, however, apply to loans secured against property as to other forms of credit: an assessment should consider only loans that could actually be raised. This would not necessarily be the unencumbered value of the property (or some proportion of it), which is simply the maximum possible amount that could be secured in this way. Under the current legal aid regulations, an applicant's principal dwelling is treated differently from most other capital assets because it would not be reasonable to expect him to realise it. It follows that he should not be required to borrow to an extent that could put his home at risk. As with other forms of credit, a responsible lender would limit any form of loan according to the borrower's creditworthiness, that is his apparent ability to meet the repayments.

Contingency funding

12. The Secretary of State's review of the legal profession in Scotland carried out in 1989 included consideration of private contingency funding but concluded that a system of contingency fees, where the lawyer receives a proportion of damages awarded, would not be in the public interest. In Scotland it was already permissible for lawyers to agree to act on a speculative, that is "no win-no fee", basis - the speculative action. The fee charged in such cases is the fee which would otherwise have been chargeable, with no premium for risk. The review concluded that it should, in future, be permissible for a client and lawyer to agree that a percentage uplift of the usual fee would be paid in the event of success. The uplift would be in the nature of a premium for the risk that the lawyer could receive no fee at all. Legislative provision to give effect to this change was introduced by section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and is due to be brought into force towards the end of 1991. The level of the percentage uplift will be determined by the Court of Session in consultation with the legal profession.

13. It is not, however, likely that the use of the speculative action, with or without a percentage fee uplift, will be widely used. At the time of the 1989 consultation paper the Faculty of Advocates estimated very roughly that perhaps 1% of their business was chargeable on this basis. Chapter 5 therefore considers the establishment of a fund which could

offer support to any applicant with a meritorious case, subject to the payment of a contingency fee.

State subsidised insurance

14. Chapter 4 discusses legal expenses insurance cover purchased by groups or individuals. Such insurance is unlikely to be affordable to people at the lower end of the income scale who will continue to need legal aid. There is, however, a further possibility: the Government could purchase cover for some or all of those currently entitled to free legal aid, possibly defined by the receipt of certain benefits. This would represent a substantial and guaranteed increase in the volume of business and should enable the chosen insurers to overcome many of the existing problems faced by legal expenses insurance, notably adverse selection (see Chapter 4). The insurers would thus be well placed to offer equivalent policies to the rest of the population at low premiums.

15. This would, in effect, transfer the administration of the bulk of the civil legal aid fund to private concerns. Considerable public expenditure would still be involved and the Government would need to ensure value for the taxpayers' money spent. Insurers would face the same problems of controlling merits and case cost which now face legal aid. Furthermore, the Government would need to be certain that there would be companies willing and able to operate a scheme of this kind. If the scheme proved unsuccessful, it would be necessary to reconstruct the machinery of legal aid from scratch.

Other Organisations

16. Some Trades Unions and motoring organisations also provide assistance to members involved in litigation. This is a valuable source of funding in many cases but has little scope as a substitute for legal aid because help is generally only available for certain types of proceedings and to a limited range of individuals.

17. Although Trades Unions' assistance is usually restricted to employment matters, most being concerned with injury at work, there is a growing trend for unions to give a wider range of legal services.

Assistance is provided by an in-house legal department or by private lawyers retained by the union.

18. The AA offers three legal services to its members. The first is free legal advice on any motoring issue. The second is free representation for driving offences (excluding drink related offences). The third is a claims recovery service for injury and uninsured losses following an accident. For a non-returnable fee (£15 or £30 according to the size of the claim), the AA will advise and negotiate a claim, either in-house or through solicitors. If proceedings are required, it is entirely at the Association's discretion whether further financial support is given; this is never done in the case of a small claim.

19. The RAC provides a similar range of services. The claims recovery service costs £40, free to holders of the Club's legal expenses insurance policy. Furthermore, for a £40 fee, the RAC's legal department will pursue a contractual claim concerning a motor vehicle.

Conclusion

20. The most promising potential alternatives to legal aid would seem to be the wider use of legal expenses insurance and a contingency legal aid fund. These are discussed in detail in Chapters 4 and 5 respectively.

LEGAL EXPENSES INSURANCE

1. Legal expenses insurance (LEI) involves payment of an annual premium to buy cover, in given categories of case, for a claimant's legal costs (including any expenses awarded against him), up to a limit of indemnity. Different forms of cover are available for commercial concerns and for individuals and families; this chapter is concerned with the latter type. Family legal expenses insurance is a common source of litigation funding in a number of foreign countries, notably Germany, but is much less widespread in the UK.

The current position

2. Legal expenses insurance has been available in the UK for over fifteen years. The market remains small although it has grown considerably in the last few years. In January 1991, the Consumer Association and The Law Society published a joint report on LEI. In a survey conducted for that report, 7% of respondents claimed to have some form of LEI. This contrasts with around 50% of households in (West) Germany and 80% in Sweden¹.

3. There are two main types of LEI: free-standing policies or cheaper, more limited "add-ons" to car or home contents insurance policies. Both usually include access to a free legal advice telephone line. This service is also available to people who do not have full LEI because it is often included as part of other types of insurance policy. Annex D describes the various types of LEI policy available, and their limitations, in more detail.

¹This may, however, in part reflect the different systems or requirements in those countries. In the western part of Germany, LEI centres around a motor based product due to the lack of comprehensive motor insurance. Furthermore, the market grew at a time when legal aid coverage was very limited. In Sweden, LEI is mandatory and primarily covers opponents' costs, while a comprehensive legal aid scheme covers own costs.

4. The Consumer Association/Law Society report included a review of the individual policies currently available and a survey of public attitudes towards LEI. The experiences of a small number of people who had made claims on legal expenses policies were also analysed. The tone of the report was generally favourable towards LEI but it made a number of specific criticisms. These included:

- a. refusal to renew the policies of some people who had made claims;
- b. unclear brochure or policy wording, particularly in respect of the exclusions from the policy and the applicant's duty to disclose potential legal problems;
- c. short time limits for reporting claims; this is especially relevant where the cause of action is not immediately apparent;
- d. inadequate arbitration procedures.

The Association of British Insurers is preparing a response to the report which will discuss these criticisms.

5. The major limitation of LEI, however, is that its relatively low volume at present puts it at risk from "adverse selection", that is the danger that it will primarily be those who anticipate litigation who buy policies. If the market could expand significantly, the greater spread of risk should keep premiums down and limit the need for other restrictions.

6. The main advantages of LEI as a source of private funding are:

- a. it already exists and there seems to be considerable potential for development and growth of the market;
- b. cover for most types of civil case (but generally not matrimonial) can be purchased; certain areas outside the scope of legal aid, such as employment tribunals, can also be covered.
- c. relatively low premiums can buy substantial cover, often up to £50,000 costs;

d. within the indemnity limit, it will cover any expenses awarded in favour of the insured party's opponent.

LEI and legal aid: a new approach?

7. LEI may already be attractive to those above the legal aid eligibility limits. Many of those eligible for contributory legal aid could also find it worthwhile, although they would have to weigh the cost of continuing premiums and any policy excess against potential liability for legal aid contributions and the statutory charge.

8. LEI has a number of advantages for a litigant compared with legal aid, for example wider scope and lower cost when a case arises. LEI could also be used in conjunction with existing or revised forms of legal aid in the funding of legal services.

9. Under this approach, legal aid eligibility would be set at a level of means below which current insurance premiums were judged to be an unreasonable expense. For example, present premiums for add-on policies should be within the means of the majority of legal aid contributors. There could be different levels of eligibility for different categories of case depending on the price and availability of policies, although a complex system with many different levels would be undesirable. Legal aid would be available for types of case which could not be readily insured (for example matrimonial).

10. In summary, direct financial assistance from the state would remain the recourse for those at the lowest income levels. Those of moderate means who could afford to pay something but who could not face the prospect of being involved in litigation entirely unaided, would henceforth be expected to make provision for themselves. Civil litigation funding would, for such people and in relevant types of case, be regarded less as a right and more in the nature of a consumer choice. The customer would not only be able to shop around for the best price but could also select precisely those types of cover which he wanted. Given sufficient demand, different forms of LEI policy from those currently available might be developed, for example insurance against heavy costs in a case that had already arisen. Such a development is already evident on a small

scale in the form of post-accident policies which cover the pursuit of a motoring claim, with a premium linked to the damages recovered.

LEI as a replacement for legal aid: difficulties

11. There are, however, a number of reasons why LEI, as it currently operates, does not represent a fully adequate alternative to legal aid. None of these problems is insuperable, but they would need to be addressed before the approach suggested above could be adopted.

a. The long term viability of LEI at reasonable premiums is not certain. Most people are reluctant to insure against a contingency which they consider remote and insurers find it hard to get the spread of risk they need. At present, claims history in the UK is too short and limited to allow firm commercial judgement. The solution must lie in an expansion of volume, coupled with greater control over cases and case cost.

b. Most policies exclude certain types of proceeding which can currently be pursued under legal aid, although in other areas, such as employment, the scope is often wider. Where broad categories of case were not readily insurable, legal aid would be available. It would not, however, be desirable for most policies to include numerous smaller exceptions.

c. The control exercised by insurers over the acceptance of individual claims, and the management and cost of cases generally, seems to be limited. Stronger controls, consistent with the requirements of the EC Directive described in Annex D, would reduce the effect of adverse selection by blocking weak cases and would generally lower costs and therefore premiums. For example, given that many claimants ask for advice on a choice of solicitor, insurers should be well placed to direct their work to those found to be efficient and develop a degree of price competition between them.

d. Existing indemnity limits (maximum £50,000 for both sides expenses) do not cover the exceptional case. For the cases affected, this represents a major disadvantage compared to legal aid or the other options considered in this paper. Similarly, the refusal

to renew the policies of past claimants, although a normal insurance practice, would make it difficult for LEI to replace whole classes of legal aid. Greater volume and stronger control of the progress of individual cases should eliminate the need for blunter instruments of this type.

Summary

12. LEI already exists and is generally a worthwhile product. At present, LEI to cover the majority of non-matrimonial civil cases is clearly within the means of anyone ineligible for legal aid. People could be encouraged to consider whether they wished to take out such insurance. There is also scope for individuals to use LEI in combination with some of the wider options for change discussed in this paper, particularly the safety net scheme discussed in Chapters 7 and 8.

CONTINGENCY LEGAL AID FUND

1. This chapter considers the principle and viability of a contingency legal aid fund (CLAF), designed to assist individual litigants with their legal expenses, regardless of their means, at no cost to the tax payer. Litigants who applied for the support of the fund would agree to pay a surcharge if their case was successful, in addition to their own expenses which would normally be recovered from the opponent. The CLAF would use these surcharges to pay the expenses of unsuccessful litigants, including any liability for opponents' expenses. The CLAF would also seek to cover its own administrative costs. Surcharges could be levied in a number of ways, notably a non-returnable fixed fee paid at the outset or an agreed percentage of any damages recovered. The CLAF could be administered alongside the ordinary legal aid fund by the Scottish Legal Aid Board.

CLAF in other jurisdictions

2. The only existing example of a working CLAF operates in Hong Kong. It was set up in 1984 as an adjunct to legal aid, backed by a one million dollar loan facility from the State Lotteries Fund; in the event HK\$400,000¹ was needed. Income began to exceed expenditure in March 1987 and the loan was paid off during 1988. Up to November 1990, there had been 297 successful applications to the scheme, representing 67% of all decided applications. The rigour of the Hong Kong merits test is illustrated by the success rate: damages had been obtained in 95 of 97 concluded cases. A total of HK\$1,586,831 had been received by the fund, which then stood at \$1,016,497.

3. The scope of the scheme is limited to pursuers in personal injury cases (excluding medical negligence) claiming in excess of the High Court limit of HK\$60,000 (c.£4,000). Successful pursuers are required to pay 10% of the first \$50,000 they recover, 12.5% of the next \$200,000 and 10%

¹There are about HK\$15 to the pound.

of any excess. These percentages are reduced if the case settles, depending on the stage reached.

4. In Western Australia, the Law Society is in the process of establishing a "Litigation Assistance Fund" backed by grants from the Public Purposes Trust and the Lotteries Commission. The fund is intended to become self-financing on the basis of a "Fund Fee", which will initially be set at 15% of the award; an initial contribution may also be required depending on the means of the applicant. Applications will be considered against four criteria: the need to maximise the fund's return, a preference for good prospects of success, the applicant's means and the desirability of supporting cases of general importance. As a result, most cases will be pursuers seeking monetary relief. The initial grant will allow the fund to support about 100 cases in the first year. New South Wales and South Australia have begun to investigate the possibility of similar schemes.

Advantages of CLAF

5. A viable CLAF could offer financial support to any litigant who has an arguable case and who might otherwise be deterred by fear of the cost. It would do this at no net cost to the taxpayer and without putting the opponents at the expenses disadvantage imposed by legal aid. A CLAF would also avoid some of the difficulties surrounding private contingency fee arrangements. If the fund was able to cover its costs (including administrative costs), it would not be necessary to restrict availability in terms of applicants' means. On the contrary, the fund would support any case with good prospects of success. There would therefore be no need for a means test so a CLAF case would be correspondingly cheaper to administer than a legal aid case.

Arguments against a CLAF

6. It might be thought wrong in principle to expect successful litigants to subsidise the unsuccessful. In general a CLAF could be characterised as a form of mutual insurance against the risk of losing a case. This analysis becomes questionable, however, when the "premium" consists of a percentage deduction from damages. This is a pragmatic approach which takes advantage of the sums available to successful litigants. The

premium is paid after the event and its size bears little or no relation to the risk the case involved. Litigants could, however, choose whether or not to use the fund, in full knowledge of what the percentage deduction (if not its actual value) would be.

7. It might be thought wrong in principle that successful parties should have to forego a proportion of their award to finance their case. The award of money by way of damages, for example, is intended to compensate for a loss. If a litigant is denied full recovery, it could be said that he has been denied a legal right and has not been adequately compensated. On the other hand, a litigant faced with risking his own money or recovering nothing if he felt unable to take that risk, might well find a CLAF arrangement acceptable. Nevertheless the acceptability of the CLAF principle is likely to depend on the size of the fees and deductions necessary to maintain a viable fund.

8. Litigants with good prospects of success might decline to use the scheme, putting its financial viability in jeopardy. With a CLAF, successful litigants face a larger bill than legally aided or unassisted parties (who recover their expenses). Using the scheme therefore becomes less attractive the more confident someone is of victory. As a result, fewer applicants with strong cases would apply, leaving the scheme with a higher proportion of weaker cases - the problem of adverse selection. The greater the proportion of losing cases, the higher the surcharges needed to maintain the fund. If there were too many losers, the necessary charges would not be reasonable and in that sense the fund would not be viable.

9. Although a CLAF would ultimately be self-financing, some initial funding would be required while it established itself. This would sustain the CLAF against the possibility that some of its first cases were lost before sufficient money had accrued to cover the cost incurred. Money would also be needed if payments on account were made in the early stages.

10. It may not be possible for a CLAF to cover all classes of case. The types of case which can be covered will depend on the form of surcharge used. A deduction from damages is best suited to significant money claims, although it could also be applied to counterclaims. The

non-returnable fixed fee approach depends on expenses being recovered from the opponent in the majority of successful cases. If the fee is not needed to offset the assisted litigant's own expenses, it can contribute to the fund. Neither approach could cover matrimonial or other family cases where damages and expenses are rarely awarded. The fixed fee system is further limited to an amount that litigants could reasonably afford at the outset of a case.

11. The rest of this chapter considers a scheme which uses both forms of funding in order to cover pursuers and defenders in all classes of case. Fixed fee cases are, however, on average unlikely to recoup their full cost, while some types of proceeding have more favourable profiles of expenses and damages awards than others (see Annex B). This raises the issue of cross-subsidisation. Winners would of course subsidise losers. In addition, pursuers would tend to subsidise defenders because of the type of funding used and personal injury victims would subsidise litigants in other types of case because they were awarded damages and expenses more frequently. It would be possible to reduce, but not eliminate, these cross-subsidies by setting differential fees and deduction rates.

12. It could also be said that less well-off successful litigants would subsidise richer losing ones because a CLAF takes no account of means. Furthermore, the better-off would be more likely to exercise adverse selection. They could afford to risk proceeding privately if they had a strong case but may otherwise be quick to take advantage of the risk-free litigation possible with a CLAF. It may therefore be appropriate to set a (fairly high) upper eligibility limit for the scheme, probably based simply on gross income.

13. A CLAF imposes little or no discipline on litigants in terms of weighing prospects against the cost of their case; for some, it represents virtually risk-free litigation. It is argued in Chapter 6 that a contributory system, by requiring litigants to risk their own money, encourages them to take a realistic view of their case and its conduct. Under a CLAF arrangement, a pursuer who fails to recover damages need pay nothing while a fixed fee, paid at the outset of a case, may have little or no effect on the litigant's subsequent behaviour. The viability of the fund could, however, be threatened if weak cases are admitted and

there is insufficient monitoring and control of costs. The Scottish Legal Aid Board's machinery for assessing merits and scrutinising the subsequent progress of cases would be required for a CLAF as much as ordinary legal aid cases.

Workings of a scheme

Calculation of a surcharge

14. It would be possible to operate a mixed scheme. Where money is claimed, the surcharge would be based on a percentage deduction; in other cases, a fixed fee would be taken. In any given class of case, applicants would not have a choice between fixed fee or deduction as this could allow them to select the more favourable one against the interests of the fund.

15. Work undertaken by the Lord Chancellor's Department suggests that a self-financing CLAF scheme for all types of non-matrimonial civil litigation would need to retain about 25-30% of damages awarded to assisted litigants and charge a non-returnable fee of about £300 when damages were not in issue. The calculations incorporate assumptions to allow for the effect of lower success rates than under existing legal aid. The scale of any adverse selection in practice can, however, only be guessed at, so the true surcharge rate would only emerge when a scheme began to operate.

16. Deductions could be made from all monetary awards above a certain minimum value (say £500). Where the expenses of a successful pursuer were not recovered in full from the opponent, the pursuer would be required to make up the shortfall from his damages in addition to the percentage charge. It is also for consideration whether there should be:

- a. a lower deduction rate to encourage settlements, or
- b. a sliding scale of deductions to protect low awards or to limit the contribution of very large winners, or
- c. different rates for different types of proceeding, to reduce cross-subsidisation; and whether

d. the deduction should be based on damages awarded or damages recovered.

17. Money claimants who failed to recover damages would not be liable for a deduction. Therefore, in order to retain some contributory element, they could be required to pay a fee at the outset as a minimum contribution. This would be offset against any surcharge that was subsequently made. The fee would be smaller than that paid by fixed fee litigants, who would not be subject to any further payment if they won.

Case control and administration

18. Applicants would need to satisfy a merits test since the viability of the fund would depend on there being more winners than losers. The test would consider both prospects of success and the likelihood of recovering expenses or damages. The test would need to be operated rigorously in order to limit the effect of adverse selection.

19. The Scottish Legal Aid Board would operate procedures to monitor progress of cases, control costs and make payments on account. The rules would need to prevent successful applicants to the scheme from withdrawing, in order to avoid the surcharge, if it became clear that they would win. Accounts to be paid by the fund would be assessed on the same basis as applied to legal aid.

20. It would be necessary for the CLAF to cover its administrative costs. The cost of processing a CLAF case would be lower than that for legal aid because there would be no detailed assessment of means and fewer contributions to handle. A fee of about £25 seems appropriate.

Relationships to legal aid

21. Although a CLAF is primarily intended to assist those currently ineligible for legal aid, it could also replace legal aid in certain circumstances and so reduce the burden on the taxpayer. The CLAF could be extended to anyone eligible for legal aid with a contribution that was commensurate with the initial fees required. If no initial fees were charged, the CLAF could be extended to all pursuers with money claims, including those who qualify for free legal aid under the existing

arrangements. A deduction from damages might, however, be harder to justify in respect of litigants of very low means.

22. If legal aid remained in its present form, there would be nothing to stop those who were eligible from using the non-means tested CLAF instead. Their choice is likely to depend on the level of contributions payable under each system and their degree of confidence about the outcome. Likely winners would do better to choose legal aid. Those less sure of their prospects might prefer CLAF, particularly if their legal aid contribution was higher than the non-means tested CLAF fees. The net result could be a shift of existing weaker legal aid cases to the CLAF, imposing on it an additional liability for opponents' expenses.

23. The arguments in paragraphs 21 and 22 above suggest a scheme which dovetails eligibility for legal aid and CLAF fees. Legal aid eligibility could be set at a level at which the maximum contribution was lower than the initial fees payable under the CLAF. Those who qualified for legal aid would therefore be unlikely to find the CLAF attractive. This approach suggests different levels of eligibility for cases paying a full fixed fee and those funded by a deduction from damages. Alternatively, eligibility could be linked for all cases to the higher figure, at the cost of some adverse selection between legal aid and the CLAF.

24. Several factors affect the level at which the fixed fee and the maximum contribution should be set. The higher the fee, the less scope there would be for transferring cases from existing legal aid. On the other hand, a fixed fee case in the scheme would come closer to covering its own cost, so the deduction in damages required in other types of case would be correspondingly less. Finally, unlike a contribution, a fixed fee would be non-returnable. Therefore, although means tested, a very high fee might be considered unreasonable to charge even relatively well-off applicants as it would more often be disproportionate to the costs of the case.

Conclusion

25. A CLAF scheme for non-matrimonial civil litigation would appear to be viable on the assumptions that fees for defenders or non-money

claimants were about £300; deductions were set at 25-30% of money recovered in other cases (with a down payment of say £100); and there was an application fee of about £25. Eligibility for contributory legal aid in the relevant types of case should reflect these charges.

26. The scheme would be an effective means of helping people face the cost of litigation, without penalising their opponents. It would, however, inevitably involve a considerable element of cross-subsidisation of losers by winners, defenders by pursuers and, for example, litigants with contractual disputes by injury victims. The proposed fee structure could be refined to reduce but not eliminate this.

27. For many, the scheme would make litigation almost entirely risk free. Rigorous controls would still be needed to prevent litigation of little intrinsic value, conducted with no regard to cost, which could inflate litigation costs generally. Chapter 7 considers approaches to widening eligibility which place greater emphasis on the contributory principle and therefore on the litigant's responsibility to consider the value for money of his case.

PART III: OPTIONS FOR CHANGE

Chapter Six

MODIFICATION OF THE EXISTING SYSTEM

1. This chapter discusses a number of possible reforms of the existing legal aid system, several of which are also relevant to the more radical proposals discussed in Chapters 7 and 8. It covers:

- i. the criteria which inform the financial conditions and the implications of these for setting and uprating the upper and free eligibility limits;
- ii. options for a more effective contributory system;
- iii. simplification of the means assessment procedure.

The financial conditions

2. Financial conditions for civil legal aid coul' be said to have two functions. The first is to direct assistance to those with the greatest need. The eligibility limits define those who are and are not judged to require assistance from public funds, including those who can pay nothing themselves. The contributory system attempts to ensure that those who can do so pay a reasonable sum towards the cost of their cases. This in turn recoups money for the legal aid fund in order to limit the total burden on the taxpayer.

3. Contributions also provide an incentive to assisted litigants to make similar judgments to private clients about the importance of commencing a case. Litigants prove that they are serious by committing their own money. A similar incentive does not exist for free legal aid. This raises the question of whether all assisted persons should be required to pay something, however small, towards the cost of their case (see paragraph 19 below).

4. Once a case has commenced, realistic decisions are also needed about whether to accept a settlement or abandon the case. Like private clients, assisted persons should be encouraged to review the worth of their case from time to time. The existing system of legal aid contributions,

however, has limited scope for promoting reasonable behaviour in this respect since, subject to any reassessment, the assisted person's liability is fixed at the outset. Having paid his contribution, he might as well fight his case to the end. On the other hand, the private client's potential liability increases the longer the case proceeds.

5. It can also be argued that litigants will take a greater interest in the conduct of a case when they can see their own money is at stake. They are likely to try to ensure expedition and economy in order to obtain value for their own money. Litigation is, however, likely to be a once in a lifetime purchase and in practice few litigants have the necessary information or understanding of legal procedures to control the conduct of their case. This emphasises the importance of ensuring that good quality practitioners are selected at the outset.

6. To summarise, contributions should be such that potential litigants are not unreasonably deterred by lack of means but equally they should be encouraged to adopt a responsible attitude before embarking on litigation.

Eligibility limits

7. The free limit defines the level below which people are deemed unable to afford any expenditure on litigation. The availability of assistance to the most needy remains a central principle of the legal aid scheme. About 80% of successful applicants for civil legal aid certificates are not required to pay any contribution. Both the taxpayer and the unassisted party therefore have a significant interest in whether, and to whom, free legal aid is awarded (see Chapter 2 paragraph 6).

8. The free limit is normally uprated each year in line with the uprating of income-related social security benefits, that is by the RPI exclusive of housing costs which are allowed separately. Recipients of Income Support are automatically granted free legal aid. There is, however, a case for linking the free limit more directly to social security benefits. The free limit effectively represents a personal allowance for the applicant's own basic upkeep; this is clearest in contributory cases. In 1990-91, it was 38% higher than the single person's income support allowance of £36.70 per week. A formal linkage to this figure would make

the criterion for fixing the free limit clear. The exact relationship will need to be considered.

9. The upper eligibility limit defines a level above which it is deemed that people do not require financial assistance with litigation. It was argued in Chapter 2 that such a system cannot effectively target need since the range of costs of litigation means that some relatively well-off people may require assistance with more expensive cases. This problem cannot be tackled by any approach to defining and uprating a fixed upper limit which considers only applicants' means, for example a multiple of the lower limit or a percentage of the population. Chapter 7 discusses three options for restructuring legal aid without involving an arbitrary upper limit.

Contributions

10. Contributions are currently set at 25% of disposable income above the free limit and 100% of capital.

The level of contributions

11. It would seem appropriate that contributions should represent an amount that the assisted litigant can reasonably be expected to spend on litigation. They should also seek to place the assisted person in a similar position to a private client. The degree to which this is possible is, however, limited. First the amount that a private client is prepared to spend on litigation is likely to vary from individual to individual and from case to case. On the other hand, at any level of means, legal aid contributions would be the same for all cases which passed the merits test. It would be extremely difficult to reflect complex private judgments in legal aid regulations. Second, while private litigants are faced with a potentially open-ended commitment if they are to pursue their case to the end, the liability of an assisted party will in some way be limited.

12. The amount which an assisted litigant can afford to spend cannot be precisely quantified. Nevertheless, the contributory system should put litigants of different means at risk of broadly the same relative expense, so as to face them with a similar judgment about worth. The resources of many people are, however, variable according to their financial priorities.

Decisions to spend savings, to borrow or to forego other expenditure reflect complex choices which cannot readily be captured by the means assessment process. The legal aid financial contributions should not push applicants to the limits of their potential resources but neither should they relieve them of the need to make choices.

13. The contributory fraction should also reflect the approach taken to means assessment and allowances (see paragraphs 24-30 below). If, as now, allowances were made for all reasonable commitments as well as basic living expenses, the remainder would be available for discretionary expenditure, including litigation. This suggests that a relatively large fraction (say 50% or more) could be set. On the other hand, if disposable income had to cover everything but the basics, a somewhat lower figure would be appropriate.

Sliding scale

14. A sliding scale of contributory fractions would take increasing proportions from higher bands of income to ensure that applicants paid as much as they could. The legal aid fund would benefit from additional contribution income at no extra administrative cost.

15. Chapter 7 discusses options for removing the fixed upper limit and outlines a system of safety net legal aid. In these circumstances, a sliding scale would have greater effect and would reflect the ability to pay of relatively well-off litigants who would become eligible. If this was combined with a simplified approach to means assessment discussed in paragraph 27a below, a suitable scale might be 25% of the first £2,000 disposable income above the lower limit, 40% of the next £2,000, 60% of the next, 80% of the next and 100% of disposable income above £8,000.

Continuing contributions

16. Since the establishment of the civil legal aid scheme, a contribution has been required in respect of one year's income, whatever the length of a case. The average length of civil legal aid cases in a small survey of

paid cases was in fact about 1 year 8 months.¹ On the one hand, it could be argued that an open-ended contribution might deter litigants since they would be uncertain of the extent of their liability. On the other, contributions from income for the duration of the case would reflect ability to pay and provide an incentive to conduct cases with expedition. Such a proposal would be consistent with the objective of placing the assisted litigant in a similar position to that of a private client. An assisted person would nevertheless be in a more favourable position than a private client because although he would not know the final total of his contribution, he would at least be certain that it was limited to a reasonable sum in terms of his means.

17. Continuing contributions could, however, involve substantial additional administrative costs if procedures were required to uprate the annual contribution, and there would be more frequent reassessments of both income and capital. In order to reduce this administrative cost, the original contribution could in most cases simply be uprated each year to keep it broadly in line with inflation. The litigant would, however, be required to apply for a full reassessment where there had been a significant change in his financial circumstances.

Interest free loan

18. If a litigant could afford to make regular contributions throughout the life of a case, he could afford to do so until the total net cost of a case had been recouped. Contributory legal aid would effectively become an interest free loan. This would considerably reduce the net cost to the taxpayer of contributory, non-matrimonial civil legal aid. It could, however, be thought an unreasonable deterrent to extend contributions for what in some cases could be a very lengthy period. Nor would there be any additional advantage in terms of litigants' behaviour. The administrative cost would again be considerable, not only for uprating, collecting and reassessing contributions but also in terms of enforcement if, as seems likely, some litigants might prove reluctant to make further payments once their case had been completed.

¹See Annex B.

Nominal contributions

19. Paragraph 3 above suggested that there could be some benefit in requiring all legally assisted litigants to make some contribution, however small, towards the cost of their case. For many of those currently in receipt of free legal aid, however, it would be difficult to identify a sum which would avoid hardship on the one hand and tokenism on the other. There would be administrative costs involved in collecting and enforcing small contributions in a large number of previously free cases but little additional income would be generated. For example, a contribution of £10 or a non-returnable fee of £5 would only produce about £50,000.

Minimum contribution

20. It would seem desirable that very small contributions should be waived as they are not worth the cost of collection and are therefore not cost effective. The minimum contribution might be set at £100.

Administrative fee

21. Paragraph 19 above outlined the difficulties in introducing nominal contributions by all assisted litigants. For the same reasons, it would not be feasible to charge all applicants for legal aid a fee to cover the administrative cost of handling a case. Any such fee should be related to the ability to pay and therefore to the contributory system as a whole otherwise the fee would simply reduce the amount of money available to pay for the litigation.

Payment direct to solicitors

22. In Scotland contributions are currently collected directly by solicitors under the Advice and Assistance and the Assistance by Way of Representation (ABWOR) schemes. Extending such an arrangement to civil legal aid cases would eliminate the Scottish Legal Aid Board's administrative costs in collecting and often recycling contributions and should produce earlier payment for solicitors. The burden of collection would fall on solicitors but would be no different from that which they face with private clients. Litigants, on the other hand, could feel better placed to question their solicitor about the progress of their case if they

and not the legal aid fund were paying their contributions direct to their solicitors. There is already legislative provision to introduce such a scheme in Scotland. Further consideration will therefore be given to extending direct payment of contributions to solicitors in civil legal aid cases.

Introduction of the Assistance by Way of Representation (ABWOR) Scheme to Civil Legal Aid

23. Another possibility is to introduce a form of Assistance by Way of Representation (ABWOR) into civil legal aid. (ABWOR is a specialised form of advice and assistance, currently available in summary criminal cases, which enables a solicitor to represent an accused in court in certain defined circumstances). Preliminary discussions have been held between The Scottish Office Home and Health Department, the Scottish Legal Aid Board and the Law Society of Scotland on this matter. The aim would be to speed the access to justice and to streamline the operation and administration of a part of the civil legal aid system. The proposal would involve postponing the need for a civil legal aid application in certain types of civil cases until an action had been raised in court and defences lodged; in undefended actions a full civil legal aid application would not be necessary at all. Subject to the application of clearly defined criteria and adequate financial control, such an approach could realise benefits in terms of speedier access to justice and lower administrative costs. The arrangements would be developed in line with the proposals by the Sheriff Courts Rules Council to streamline court procedures. Discussions are continuing with a view to introducing a suitable scheme in 1992-93.

Means assessment

24. Means assessment is necessary both to determine an applicant's eligibility for legal aid and to fix the contribution, if any, he should pay. Under the present system the disposable income and capital of an applicant is calculated by the Scottish Legal Aid Board on the basis of information provided by the applicant and his employer, and by applying a number of statutory and discretionary disregards, allowances and other adjustments. The calculations involved can be extremely detailed and complex.

25. This high degree of detail and precision is intended to ensure fairness between applicants. So far as contributions are concerned, however, it makes only a marginal difference to a figure which represents a judgment about what litigants could be expected to spend, rather than a very exact calculation of what they could afford. The assessment calculations have greater significance in terms of eligibility because of the fixed upper limit. Fairness and consistency could, however, be achieved equally well with a simpler system.

26. The simplest approach would be to consider only the gross income of an applicant. This has the advantage of giving, on an immediately comprehensible scale, an impression of people's broad financial standing. A system of allowances, however, often produces different outcomes for applicants with the same gross income (see Annex B). This suggests that some individual allowances will be needed in order to reflect adequately the ability of applicants to pay their contribution towards the case.

27. There are two possible approaches to defining the factors which should be allowed:

a. allowances could be restricted to types of expenditure which are unavoidable in the strictest sense. This would include any legal obligations such as tax and expenditure which is clearly essential to sustain a household, notably the basic cost of housing and feeding an applicant and his family. These are currently covered by dependants' allowances, the free limit and the allowance of housing expenditure.

b. allowances could cover expenditure which the applicant could have chosen not to incur. This could include any expenditure to which the applicant was committed at the time of the application or which could not reasonably be deferred. This might include, for example, actual housing expenditure, school fees and credit repayments.

28. The present system broadly reflects (b) with many commitments allowed under the assessment officer's discretion. The treatment is, however, not wholly consistent. Thus most credit and hire purchase

instalments are considered to fall within the free limit. Repayment of loans for home improvements are, however, allowed, as are planned repayment of debts, including hire purchase arrears. Expenditure on a second home, presumably unavoidably committed for all practical purposes, is only allowed if the applicant has a "good reason" for living away from the main family dwelling. In other words, there is an attempt, not explicitly defined, to judge the merit of different types of expenditure.

29. Generally, the approach at 27(b) can be seen as inequitable between applicants who had chosen to spend (or save) in different ways. Moreover, whereas the limits of expenditure detailed in paragraph 27(a) are generally incurred by all individuals whatever their income level, some of the wider allowances presently made may be applicable only to higher income groups. As a result higher income applicants may be able to reduce substantially their disposable income thereby making them eligible for legal aid. It can be argued that higher income applicants could have chosen not to incur such expenditure and should not thereby gain an advantage compared to those who could not afford to make such choices.

30. Annex E discusses the factors considered under the current procedures in more detail, with a view to developing a simplified system particularly in relation to the proposal for "safety net" legal aid discussed in Chapters 7 and 8. Many of the recommendations in Annex E could, however, be adopted with advantage in any event. Simplification could save administrative cost and should make the process more understandable to applicants. In essence, allowances would be restricted to factors in category (a) of paragraph 27. Other commitments, that is those taken on by choice, would require to be met from disposable income.

ELIGIBILITY RELATED TO CASE COST

Introduction

1. At present, eligibility for civil legal aid in Scotland is restricted by a fixed upper limit for income and capital. This can create difficulties for those above the limits who are faced with particularly expensive litigation or who fear that their case might prove to be an expensive one. On the other hand, people with cheaper cases within their means may receive legal aid. Such cases represent an unnecessary burden to the legal aid administration, to the taxpayer and possibly to the assisted person's successful opponent who may not be able to recover his own expenses in full. Chapter 2 argued for an approach to eligibility which focused on need. This chapter examines various options for achieving this.

2. Three approaches to wider eligibility are considered:

a. universal eligibility for legal aid, coupled with high contributions from the better off;

b. a discretion to waive the upper eligibility limit when cases seemed likely to be expensive; and

c. a safety net legal aid scheme, which would only operate when a case proved to be beyond the means of the litigant.

Cost of wider eligibility

3. All three options are based on the contributory principle, so that the legal aid fund would only meet the cost of cases in excess of any recoveries and the means-related contribution. All new cases brought in by wider eligibility where this occurred would represent an additional net cost to the fund. On the other hand, the scope for savings would be limited as existing cases (ie cases which fall within the present eligibility limits) where the contribution exceeds the cost cause little or no net cost to the fund.

4. Any attempt to cost an entirely new system necessarily involves a number of speculative assumptions. Nevertheless, on the basis of work by the Lord Chancellor's Department for England and Wales, it is estimated that the additional net cost of a safety net scheme for Scotland as outlined in this chapter might be of the order of £0.25 million pa at 1990 prices. Other things being equal, the cost of the other options would be roughly the same. A key assumption in the costing is the propensity of better off people to litigate under a new scheme. The above costing assumes that those eligible under the new scheme would litigate with the same frequency as those currently eligible for contributory legal aid. A variety of factors will affect this, including the wealth of the people involved and the structure of the option adopted. The possibility of a greater liability for opponents' expenses under a safety net scheme might discourage some potential litigants. In so far as it did, the additional cost would be reduced.

5. The estimated costing also incorporates the effect of two of the proposals discussed in Chapter 6: contributions continuing throughout the life of the case and a sliding scale for the contributory fraction. The collection of larger contributions would help to offset the additional cost of wider eligibility.

Criteria affecting the choice of option

6. The balance between the three options listed in paragraph 2 will depend on the degree to which each fulfils the following objectives:

- a. to facilitate access to justice, by providing financial assistance to litigants who require legal representation and who could not otherwise afford to proceed;
- b. that those who could afford to proceed themselves are not unduly deterred by fear or uncertainty about the outcome and the possible cost of the case;
- c. to limit the burdens to which unassisted opponents of assisted parties are subject by confining the protection against expenses provided by legal aid to those who need it;

d. to keep the administrative effort involved to a minimum, for example by eliminating unnecessary grants of legal aid;

e. to promote so far as possible responsible behaviour on the part of litigants, so as to help secure value for the taxpayers' money spent on legal aid.

Universal eligibility

7. Under this option, there would be no, or a very high, upper eligibility limit for legal aid. The greater ability to pay of many applicants would simply be reflected by their larger contributions. These could be assessed on a sliding scale, (see Chapter 6 paragraphs 14-15). The contributions would partly offset the additional cost to the legal aid fund so that net assistance would be approximately matched with need. The abolition of an upper eligibility limit was recommended by the Royal Commission on Legal Services in Scotland (Hughes, 1980).

8. The major drawback with this proposal is that well-off individuals could apply for legal aid whatever the likely cost of their case. Many might choose to do so in order to "insure" themselves against exceptional expense. This would lead to substantial additional administrative cost, much of it unnecessary. Litigants could also benefit from partial protection against opponents' expenses. It follows that this option does nothing to exclude existing cases which are within the means of the litigant but which nevertheless receive legal aid. It would also lead to many more cases in which both parties were legally aided. This would reduce the proportion of its expenses which the legal aid fund could recover from the other party.

Flexible upper limit

9. This proposal also offers assistance to people of larger means but attempts to restrict it to those who face particularly high cost in order to reduce the administrative burden inherent in universal eligibility. The Scottish Legal Aid Board would have the discretion to waive the upper income limit in cases where the cost seemed likely to be higher than the means of the applicant. A contribution could then be calculated on the existing basis. A similar discretion already exists in respect of capital.

10. Accurate prediction of the final account would, however, be difficult. Chapter 2 argued that there is scope for lawyers to increase the frequency with which estimates of cost are provided. Such advice is, however, likely to be in terms of a range of possible figures, depending on different outcomes. An inherent uncertainty will always remain in litigation because a case could settle at any stage from raising an action to proof. The Scottish Legal Aid Board would have to make this judgment at the beginning of a case on the basis of information from an applicant who would have a considerable incentive to exaggerate the likely cost of his case.

11. It is therefore unclear how a flexible income limit would operate in practice. If estimates were based on the worst case, (ie the likely cost if a case went to a full trial), many applicants would receive legal aid unnecessarily. To this extent, the problems of the universal approach would still apply.

12. Alternatively, the discretion might be exercised only in extreme or clear cut cases, as currently appears to be the case in respect of capital. This raises the question of how to treat initially unsuccessful applicants whose cases turned out to be expensive. They could be permitted to reapply at a later stage and the amounts they had already paid treated as part of their contribution. In this case, they would effectively be in the same position as applicants under the safety net scheme proposed below.

Safety net

13. Under this proposal, litigants would begin their cases privately, making arrangements to pay their solicitor in this capacity. They would receive legal aid if (and only when) the case cost exceeded a level (the "spending limit") commensurate with their means. This option eliminates grants of legal aid in cases within the litigant's own means and avoids the problems involved in attempting to predict the cost of the case at the outset. As an unassisted party, the unsuccessful litigant would be liable in the ordinary way for his opponent's expenses incurred before the date of the legal aid certificate. Thereafter, the legal aid expenses protection rules would operate. The detailed operation of a safety net scheme is considered in Chapter 8.

Advantages

14. A safety net would have the following advantages. The existence of a safety net would benefit those who are currently ineligible for legal aid and who may be deterred from litigating by the possibility of high cost, while at the same time targeting actual assistance on cases of demonstrable need.

15. Potential users would be liable for the full expenses of successful opponents incurred prior to the grant of legal aid. This would reduce the burden faced by the unassisted opponent and emphasise the litigant's own involvement and direct financial stake in the case. Although preferable to the position faced by a fully private litigant, this potential liability does involve an element of uncertainty greater than that represented by own expenses which are circumscribed by the spending limit, and could represent an unreasonable deterrent against litigation unless it was related in some way to the ability to pay. Paragraph 22 below argues that in most cases such a relationship would exist.

16. A safety net spending limit could be a more effective mechanism than a legal aid contribution for encouraging litigants to take realistic decisions about whether to proceed, both at the outset and as the case unfolded, and to take a greater interest in controlling progress. As a private client, paying his own money directly to his solicitor, the litigant might feel in a stronger position to question the conduct of the case. Furthermore, his potential liability would not be limited to a fixed sum but would continue to accrue in the form of potential opponent's expenses. This should provide an incentive for expedition.

17. Initially, cases would avoid the application and other procedures associated with legal aid and the additional time and cost that these inevitably require. Solicitors would negotiate their own payment arrangements and could generally expect to receive some money more quickly than at present.

18. Cases where the spending limit exceeded cost would be excluded altogether, including those which receive legal aid under the current system. There should therefore be significant administrative savings.

19. Both sides would be under an incentive to settle. Before he reaches legal aid, the applicant risks liability for his opponent's expenses in full. The opponent knows that expenses protection is over the horizon and will be reached more quickly if he acts to put the assisted person to extra expense.

20. A safety net system could involve conducting the legal aid merits test at a later stage in the case. This should make a more accurate assessment possible since more information about the case would be available.

Drawbacks

21. The main argument against a safety net is the uncertainty of its protection. The litigant commencing a case would know what his spending limit on his own expenses would be but, if the merits test was not conducted until that limit was reached, he would not know whether he would subsequently be granted legal aid. He would also face an uncertain and possibly large liability in respect of his opponent's expenses. It is possible that this could undermine the objective of overcoming the deterrent to litigation caused by fear or uncertainty of cost. On the other hand, the merits of a case can change as it proceeds and a legal aid certificate can already be discharged in such circumstances. Moreover, it is primarily the function of lawyers rather than the Scottish Legal Aid Board to give the best possible advice on merits and prospects and to revise that advice as more evidence comes to light. A litigant should not be put in a position where he has spent a substantial sum only to learn that he has no case. If litigants will not invest in the advice of professional lawyers, it is difficult to see that the taxpayer should do so.

22. As regards the potential liability for opponents' expenses, this would be indirectly related to means since in the majority of cases opponents' costs are likely to be roughly of the same order as own expenses. Given that the spending limit was based solely on one year's income, most unsuccessful litigants would face a similar account as they might have been ordered to pay under section 18 of the Legal Aid (Scotland) Act 1986, under which an unsuccessful assisted party may be liable for his opponent's expenses, but only up to the amount, if any, which it is

reasonable for him to pay in all the circumstances. It seems unlikely that opponents would take advantage of the different safety net rules by seeking to inflate their own account. If they did so, party and party taxation exists to protect the unsuccessful litigant.

23. The situation would be complicated, however, when the spending limits included a capital element. It would seem appropriate to introduce a fraction for capital of 50% so that unsuccessful litigants would retain sufficient money to meet opponents' expenses of a similar level to their own.

24. Nevertheless, this approach has the drawback that some litigants would face opponents with unusually high (but not unreasonable) expenses or whose expenses had accrued more rapidly in the early part of the case. Litigants would know that their potential liability was likely, but not certain, to be no greater than their spending limit. This would be part of the risk they assumed when choosing to litigate.

25. Other possible drawbacks of the safety net are:

a. Complexity: the split liability for opponents' expenses and/or the method for calculating the spending limit could confuse, and possibly deter, some litigants.

b. Merits: there is a danger that a later merits test, rather than operating more stringently, would in practice tend to give the benefit of the doubt to the litigant who had committed a considerable sum of money towards a case.

c. Control: there would be no direct controls of pre-legal aid cost.

d. Behaviour: there could be an incentive for clients to run up expenses extravagantly in order to reach their fixed spending limits and the relative haven of legal aid as quickly as possible.

A safety net panel

26. Some of the difficulties with a safety net scheme could be reduced if there was a panel of safety net solicitors who met accredited standards of

quality and efficiency. This could be linked with the development of franchising for legal aid lawyers. In many cases, the Scottish Legal Aid Board would become the guarantor of quality rather than the provider of financial assistance. Safety net panel members would be well placed to understand and explain the complexities of the system and to assist clients in calculating their spending limit. They would also have shown themselves to be good predictors of prospects. Finally, there would be less likelihood of wasteful expenditure or inefficiency during the first part of the case.

Conclusion

27. It is necessary to consider the three options in the light of the general objectives described in paragraph 6 above. Each provides financial assistance in cases of need. Universal eligibility, furthermore, eliminates any danger that those whose case cost will ultimately prove within their means will be deterred by fear of higher cost. On the other hand, many more litigants would benefit unnecessarily from the protection of legal aid. This would add to the administrative costs of the Scottish Legal Aid Board and prove burdensome to unassisted opponents. A safety net avoids these problems but introduces an element of greater uncertainty for prospective litigants. A flexible limit could involve the advantages and disadvantages of either of the other options, depending on the operation of the expenses assessment.

28. The options involve different approaches to controlling the progress and expense of cases:

a. the safety net places much of the onus on the litigant and his solicitor. As the knowledge of litigants is likely to be limited, much depends on the quality of the legal advice they receive. One possible answer would be for the Scottish Legal Aid Board to franchise safety net solicitors.

b. universal eligibility or flexible limits would require more direct administrative control by the Scottish Legal Aid Board. In particular universal eligibility might require controls to be applied throughout the life of any case, although at substantial administrative cost.

29. Any of the options discussed above may involve some additional funding by the taxpayer. It will therefore be important to ensure value for the money spent. The development of appropriate control systems would therefore be a precondition of wider eligibility. An emphasis on demonstrable value for money argues for the more focused expenditure and lighter administrative burden of the safety net approach. This option is therefore considered in detail in Chapter 8.

LEGAL AID SAFETY NET: DETAILS OF A SCHEME

Introduction

1. This chapter considers in more detail the possible structure of a safety net legal aid scheme. The litigant would begin a case in a private capacity up to an appropriate spending limit. If the limit was reached, the litigant would then, subject to a merits test, be eligible for legal aid assistance.
2. The potential litigant would select a solicitor who was willing to transfer to the safety net if that became necessary. The solicitor would help the client calculate his disposable means and spending limit. If an immediate application for legal aid was not suggested, the solicitor would ensure that the proofs of income etc needed for any later application were available.
3. As with any other private case, client and solicitor would also decide on the arrangements for remuneration for the first part of the case. The cost of a case is unlikely to accrue at the same rate as annual instalments from income. It would be necessary to agree whether and how any payments on account would be made. The operation of the safety net would, however, depend on the incurred expenses of the case: it would be irrelevant whether the client actually paid his contribution to his solicitor sooner or later. Indeed, although the spending limit would be calculated on the basis of annual income, the client could finance his case by any means he wished, for example from income, capital or credit not forming part of the spending limit or indeed through legal expenses insurance.
4. The rest of this chapter poses a number of questions about key elements in the structure of a system of this kind and suggests possible solutions.
 - A. Eligibility
 5. Who, in terms of means would be entitled to apply to the safety net scheme? The concept of a safety net assumes litigants who are able to pay at least a proportion of their expenses from their own resources.

Therefore, it is clearly not applicable to those who would receive free legal aid, which would continue broadly as at present. Section C below considers whether there is also a need to retain a contributory legal aid band for those who were unlikely to complete even the simplest case without needing further assistance.

6. At the other extreme, it may be thought appropriate to exclude the very rich in any event, although even they in theory could start a case which proved beyond their means.

B. Application process

7. Should there be a facility to register cases with the safety net scheme at the outset or should the first (and only) application occur when the litigant had already reached his spending limit? An initial application could serve a number of functions:

a. a provisional merits test could be made to advise the applicant of his chances of later receiving legal aid. However, since circumstances could change, this could not be a guarantee and would therefore only be of limited value. Worse, it could provide false security. Under a safety net scheme, the onus would be on the litigant's lawyer to provide sound advice as to prospects.

b. a means test could be conducted and the applicant told what his spending limit would be. This would not be necessary if the calculation was simple enough to permit self-assessment (see Section D below).

c. estimates could be made of the scheme's future liabilities which would aid financial management.

d. it would be possible for the Scottish Legal Aid Board to operate controls on cost throughout the life of a case.

8. The major drawback of a preliminary application procedure at the beginning of a case is that the Scottish Legal Aid Board would incur administrative expense in a much larger number of cases. Much of this

effort would prove unnecessary since many cases would not in the event require further assistance.

9. This suggests that applications at the beginning of a case, or at any time before the spending limit was reached, should be discouraged. Nevertheless, the option could be retained for those who had particular difficulty in calculating their own spending limit (eg business cases) or who wanted a provisional Scottish Legal Aid Board view of the merits before proceeding. It would be appropriate to charge an administrative fee in such cases.

C. A contributory legal aid band?

10. Should immediate legal aid be available when the spending limit is clearly inadequate? There will be some applicants whose case seems likely or almost certain to exhaust their spending limit. There may therefore be a case for allowing them immediate access to legal aid without first spending their contribution.

11. For the litigant who qualified for it, immediate contributory legal aid would have two advantages. He would not be uncertain, during the early stages, whether his case could pass the merits test (although legal aid could still be withdrawn if the merits changed). Secondly, protection from opponents' expenses would also be more certain because any liability would be limited to "a reasonable amount" by the operation of the legal aid expenses rules. Immediate legal aid would, however, make little difference in terms of liability to pay towards own expenses, which would be calculated in roughly the same way under either system. Moreover, it is not clear that the safety net would prove an unreasonable deterrent to lower contributors in particular. The period between their starting a case and applying for legal aid would be relatively short, limiting the period of uncertainty and the unrestricted liability of unsuccessful litigants for their opponents' expenses.

12. A further advantage of a contributory band springs from the fact that the minimum spending limit for safety net legal aid ought to be sufficient to allow some positive progress on the case, at least the taking of initial advice, before an application for legal aid was required. It would probably need to be at least £100. If the safety net operated

immediately above the level for free legal aid, it would seem appropriate to waive contributions below that amount.

13. The disadvantages of a contributory band are as follows:

a. the higher the upper limit of a contributory legal aid band, the larger the number of cases where own expenses were lower than the contribution. Any legal aid band should therefore only cover levels of contribution which would be exceeded by expenses in the great majority of cases.

b. those in the contributory band would not be subject to "private client realism" to the extent that they would be under a safety net arrangement.

c. the overall system would become more complex. The same approach to means assessment would be needed throughout so that litigants were eligible for only one of free, contributory or safety net legal aid. However, once eligibility was established, it would be possible to calculate contributions on a different basis. This might prove necessary if a capital fraction was used under the safety net (see Chapter 7 paragraph 23); the same approach would not be appropriate for contributory legal aid. The result would be that people of lower means could receive immediate legal aid, but some would pay a higher contribution.

14. The arguments for and against an intermediate contributory legal aid band appear finely balanced. The overall scheme would be more complex and some cases would receive legal aid unnecessarily, although the numbers would not be significant up to a contribution of around £300. On the other hand, although in reality their liability would be much the same, those who remained eligible for legal aid would not face the additional uncertainty which a safety net approach might engender. An option would therefore be to allow those whose safety net spending limit would be less than say £300 to apply for immediate contributory legal aid.

15. On the other hand, the safety net scheme represents a major departure from the existing system which it may be appropriate to test first at a higher level. An alternative option, therefore, would be to

keep the contributory legal aid band much as it is now with the safety net starting immediately above the currently eligibility limits. This would achieve a major objective of the safety net by extending assistance to those who are now ineligible but face the prospects of high cost, but it would not affect those who now qualify for legal aid. The disadvantages described in paragraph 13 above would, however, apply to a larger number of cases and this option would effectively constitute a straightforward extension of eligibility.

D. Assessment of spending limit

16. What factors are relevant to determining the spending limit? The spending limit in a safety net system would have broadly the same objectives as contributions under legal aid (see Chapter 6 paragraphs 2-4). Its particular importance is in giving the litigant a clear and direct financial interest in the conduct of the case. It could be calculated in the same way as existing contributions or incorporate any of the specific reforms described in Chapter 6 for example a sliding scale for the contributory fraction.

17. Section B above argued that in order to minimise administration costs, litigants should not be required to make a preliminary application before reaching their spending limit. It follows that litigants must be able to assess the level of their spending limit for themselves in order to determine when they should apply for legal aid. This presupposes a much simpler system than at present, involving only readily identifiable factors and straightforward calculations. Chapter 6, paragraph 25 argued that the precision of much of the existing assessment procedure is unnecessary. This would be even more true with a safety net system because only marginal differences in the spending limit, rather than all or nothing eligibility, would be at stake. Simplified means assessment is discussed in detail in Annex E.

E. The contribution period

18. Should contributions from income continue throughout the life of a case? Chapter 6, paragraphs 16-17 suggested that legal aid contributions should continue to be collected throughout the life of a case, subject to annual uprating or reassessment. The same approach could apply to a

safety net scheme. This might involve the litigant periodically adding to his spending limit to reflect further income. Once the spending limit was reached, contributions would continue under legal aid.

19. Periodically uprating the spending limit would:

- a. reflect the greater ability to pay of many of those who might receive assistance from the safety net;
- b. reduce the number of cases needing assistance because in some cases the case cost would never catch the increasing spending limit;
- c. generate more contribution income in cases which did require the safety net.

20. There are, however, a number of drawbacks:

- a. the system would be more complicated. Litigants may not understand the need to chase a constantly retreating spending limit, and self-assessment of means would become more onerous.
- b. the safety net would involve a greater degree of uncertainty for the litigant. This would be particularly significant in respect of opponents' expenses. Some unsuccessful litigants could be liable for expenses incurred over a substantial period.
- c. as a result, the incentive for the litigant to reach his spending limit as quickly as possible, in order to limit his liability for opponents' expenses, would be increased.
- d. on the other hand, a solicitor who was charging more than the going legal aid rates would have an incentive to delay in order to keep the case private for longer.
- e. depending on other aspects of the system, there could also be a significant additional administrative burden in terms of reassessments, collection and enforcement of contributions.

21. Given these drawbacks, a better approach might be to base the safety net spending limit on income from a fixed period (probably one year) with contributions continuing once the safety net was reached. This would more closely reflect the ability to pay without increasing complexity and uncertainty for litigants. Legal aid contributions would be backdated or delayed, so that they related to successive annual income periods.

F. Operation of the trigger

22. **What happens when the spending limit is reached?** At some point during his case, a litigant may apply to fall into the safety net and obtain legal aid. There would need to be a merits test at this stage. Proof would be required that the applicant's means and spending limit were as stated. The solicitor would also submit a copy of his bill to date to show that the necessary costs had been incurred. The legal aid certificate would date from the point at which the limit was reached.

23. A mechanism would be required to ensure that the expenditure which triggered the grant of legal aid was reasonably incurred. The taxpayer should not be liable for the expenses of a larger part of the case than necessary because some of the earlier expenditure had been extravagant or wasteful. This is a particular danger given the possible incentive to reach legal aid as quickly as possible in order to enjoy its more certain protection against opponents' expenses. Furthermore, it is undesirable for opponents to face a legally aided party sooner than strictly necessary.

24. It follows that when determining the liability of the legal aid fund, the pre-spending limit expenses and the later expenses should be seen in the same light. Expenditure on items not allowable under Legal Aid Regulations should be discounted, as should any difference between the hourly charging rate agreed by solicitor and private client and legal aid fee rates. An artificially high charging rate would be the easiest way for a client, who was ready to pay up to his full spending limit, to reach legal aid quickly. This approach would mean that the litigant would be liable for any disallowed expenses, in addition to his spending limit.

25. There are two possible ways of allowing for the effect of unreasonable expenditure:

a. the Scottish Legal Aid Board could conduct an interim assessment of the solicitor's account when considering the application. Legal aid would be refused where the expenditure was judged to be unreasonable. A measure of flexibility would be necessary where the assessed spending was reasonably close to the actual limit in order to avoid almost immediate reapplications. This approach would, however, involve a substantial additional administrative process.

b. alternatively, an adjustment could be made at the end of the case. Subject to other recoveries, the legal aid fund would meet the account as allowed under Legal Aid Regulations, less the litigant's spending limit. This would leave the litigant liable for his original spending limit contribution, plus anything disallowed on that part of the account dating from before the grant of legal aid. This approach would effectively protect the taxpayer, although the opponent would face legal aid expenses protection from an earlier date.

26. Option (b) is preferable. The interim account submitted on application should not be considered in detail. Legal aid should only be refused if the account was blatantly inflated. It is for consideration whether a revised date could be calculated after the assessment from which expenses protection should operate. Otherwise, opponents with heavy expenses would stand to recover less under the legal aid expense rules than they would have done privately.

PROVISIONAL CONCLUSIONS

Introduction

1. The main options for change discussed in this paper start from the premise that in order to target legal aid effectively it is necessary to look not only at the means of potential applicants but also at the alternative sources of funding available to them and the costs they face. Public funds should not cover cases which individuals can afford but should provide assistance to those who are currently excluded under a fixed limit eligibility regime and so effectively debarred from pursuing expensive cases. In this sense the provisional conclusions of this stage of the review confirm and indeed extend the principle which has underpinned the development of the legal aid system. Given the steady increase in total civil legal aid expenditure, however, eligibility cannot be widened without ensuring that value is being obtained for public money spent.

The options

2. The three main funding options canvassed are legal expenses insurance, a contingency legal aid fund (CLAF) and a safety net scheme. Some possible reforms to the existing system have also been discussed. What cannot be offered is a straightforward extension of the existing eligibility limits. This would not ensure that legal aid is directed to those who need help in the light of the expenses they face. Nor does this paper favour a flexible upper limit. Although this purports to target provision, it would be difficult in practice to do so accurately, thus including some who should be excluded and vice versa.

3. Each of the three main options would, albeit in different ways, target help with legal expenses to where it is needed. Legal expenses insurance is a private sector solution to the problem of extending eligibility which would place decisions on coverage on individuals. A CLAF, while publicly administered, would be funded by those who use it. A safety net scheme would be publicly funded and administered but only above the limit of what individuals could reasonably be expected to pay for their own cases. Each of the options recognises that there will be a very large band of potential litigants who cannot reasonably be expected to pay any contribution from their own resources whether by way of insurance premium, initial fee, spending limit or traditional legal aid

contribution. Each therefore assumes the continuation of free legal aid to those who qualify for it, subject to the statutory charge or possibly a percentage deduction under a CLAF.

4. The options which are proposed are not, of course, mutually exclusive. Legal expenses insurance exists now and up to a point could continue to attract purchasers alongside a CLAF, a safety net or a traditional legal aid scheme. A sufficiently flexible and well developed insurance market might allow the option of excluding from public funding those whose means would be sufficient to provide themselves with insurance cover. A safety net scheme could either replace or supplement all or part of contributory legal aid. Much the same is true of a contingency legal aid fund, although given the drawbacks of this approach it may be preferable to treat it as a supplement to extend assistance to those outside the existing legal aid scheme. If this were done, it would not be possible to make the safety net available in the same classes of case, since given the choice a defender with good prospects of success would be likely to avoid the CLAF and choose the safety net. A CLAF is most likely to be successful if its use is restricted to pursuers with personal injury cases.

5. The public sector options for funding are the safety net and a CLAF. On balance it is provisionally thought that the safety net proposal is the one which best targets legal aid to need. It incorporates a flexible upper limit while removing from legal aid those who do not need its assistance. Views are sought on this, on possible improvements to either scheme, and on the extent to which - given that they would in practice both be administered by the Scottish Legal Aid Board - the two schemes could exist side by side. In considering the operation of the two schemes, the consultation paper recognises that there might be a case for introducing them, if they were thought acceptable in principle, at a higher level than strict logic suggests: initially, for example, at the present level of contributions above which applicants become ineligible for legal aid.

6. If the public sector options, separately or in combination, are not thought apt to solve the problem of those now ineligible, consultees should state:

- a. whether the private sector option of insurance would serve instead, either as it is currently provided or with modifications;
- b. if not, any other proposals for tackling the problem, bearing in mind the limitation stated in paragraph 2.

Comments

7. In addition to the questions raised in paragraphs 5 and 6 above, comments are invited from interested parties on all aspects of the issues raised in this paper. It would also be helpful to have comments and information on the following:

Improvement of value for money and control systems

Methods of improving cost control, including franchising and stage payments.

Contributory legal aid and the safety net

- a. Is it right to define eligibility in relation to both means and cost? Is the safety net approach the best means of achieving this? Should eligibility vary according to the type of case?
- b. How should the amount that people can reasonably pay towards their litigation be determined? Should this vary with the type of case?
- c. Should there be a sliding scale for assessing contributions and spending limits? Should contributions from income be payable for more than the current one year period?
- d. Are the proposals in the paper for a simplified form of means assessment acceptable?
- e. Should a safety net scheme incorporate an initial application in order to conduct means and merits tests? What advantages would consultees see in such a process? Should there be an intermediate contributory legal aid band?

- f. Have you any comments on any other features of the scheme described in Chapter 8?

Legal expenses insurance

- a. How might legal expenses insurance best be developed?
- b. How might LEI best be combined with existing or revised legal aid?

Contingency legal aid fund

- a. Is the principle of winners subsidising losers inherent in a CLAF acceptable?
- b. Which of the various methods of funding a CLAF are preferable? What factors should determine the maximum level at which deductions and fees could reasonably be set?
- c. What relationship should a CLAF have to other schemes? Should a CLAF be restricted to particular types of case, such as personal injury cases?
- d. Have you any comments on the detailed workings of the scheme described in Chapter 5.
8. Views would also be welcome on any further options which can be identified but which have not been covered in this paper.

CIVIL LEGAL AID
BACKGROUND INFORMATION

Growth of civil legal aid 1951-1990

1. Table 1 shows the increase in the gross expenditure of civil legal aid (matrimonial and non-matrimonial) and the number of legal aid certificates issued over the lifetime of the scheme. Graph 1 shows the overall increase in the number of civil legal aid certificates granted since 1951, the largest increase occurring between 1970 and 1980.
2. Table 2 analyses the recent position in more detail. It covers non-matrimonial civil legal aid only.
3. The tables also show the average cost of a civil legal aid case both in absolute terms and converted to 1990 prices.

Table 1

Civil Legal Aid Certificates Issued And Gross Expenditure : 1951/52 - 1989/90

Period	Certificates issued		Gross expenditure		Average cost per case		Average cost per case (1990 prices)	
	number per period	Percentage increase	expenditure per period (£k)	Percentage increase	(£)	Percentage increase	(£)	Percentage increase
1951/52-54/55	17128	—	608	—	35.48	—	425.04	—
1955/56-59/60	18215	6	1035	70	56.81	60	600.64	41
1960/61-64/65	28348	56	1995	93	70.36	24	658.26	10
1965/66-69/70	40177	42	3694	85	91.04	31	720.28	9
1970/71-74/75	53826	34	7590	105	141.01	53	777.99	8
1975/76-79/80	84697	57	16113	112	190.24	35	524.35	-33
1980/81-84/85	99358	17	52376	225	527.15	177	826.89	58
1985/86-89/90	101010	2	73540	40	728.04	38	891.74	8

Notes

1. The number of certificates issued and the average gross expenditure include all civil legal aid cases, matrimonial and non-matrimonial.

2. Figures relating to legal advice and assistance are also included for the period 1960/61 to 1975/76 as a result of the way in which statistics were collected during that period.

CIVIL LEGAL AID

Certificates issued

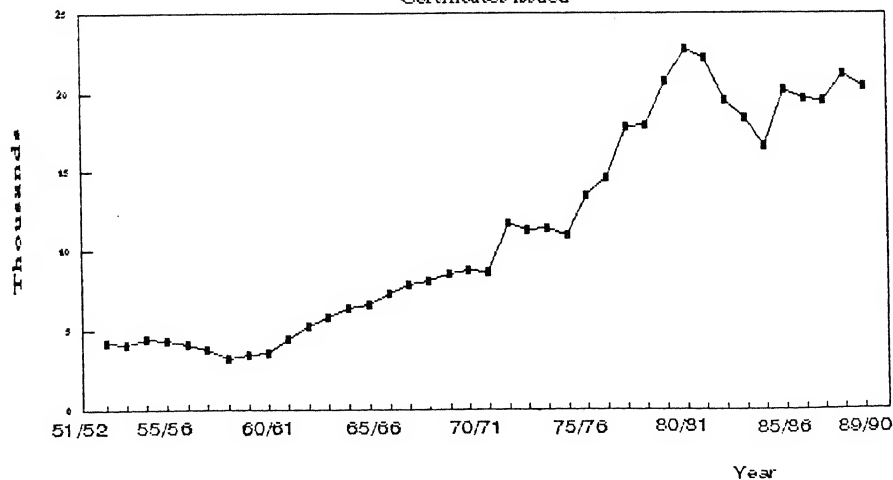


Table 2 Non Matrimonial Civil Legal Aid Certificates And Gross Expenditure : 1983/84 - 1989/90

Year	Certificates issued per annum		Bills paid per annum	Average gross expenditure per annum	Average cost per case		Average cost per case (1990 prices)	
	Number	Percentage increase	Number	(£k)	(£)	Percentage increase	(£)	Percentage increase
1983/84	3798	—	4569	2747	601	—	893	—
1984/85	3768	-1	4276	2369	554	-8	784	-12
1985/86	4775	27	2179	1856	852	54	1136	45
1986/87	4657	-2	2728	1999	733	-14	945	-17
1987/88	5575	20	2868	2830	987	35	1222	29
1988/89	6547	17	6009	4351	724	-27	855	-30
1989/90	6146	-6	5697	4859	853	18	934	9

Notes

1. Table 2 includes non-matrimonial cases only ie actions relating to affiliation and aliment, adoption, reparation, diligence and other.

APPLICANTS' MEANS AND THE COSTS OF CIVIL LEGAL AID CASESIntroduction

This Annex looks at the means of applicants for non-matrimonial civil legal aid in Scotland and at the costs of such cases.

Means

1. This section analyses information on the means of the Scottish population drawn from the Family Expenditure Survey (FES), which is compiled annually by the Central Statistical Office (CSO) and shows the average income and expenditure for a representative sample of the Scottish population as a whole, and from a small survey of Scottish Legal Aid Board application records which contain detailed information on the means of those applying for legal aid.
2. FES data for Scotland for 2 years (1988 and 1989) have been added together for use in this Annex. There are, however, a number of limitations in using FES data. In particular, some categories may be affected by sampling errors because of the small size of the FES sample in Scotland. As a result, the figures set out below can only give a broad estimate of the position.
3. Information relating to the means of applicants for non-matrimonial civil legal aid was also collected for all applications made during October 1990. The data was extracted from the application records stored on computer and from examination of the L14 form used by the SLAB staff to calculate disposable income and capital. A total number of 571 applications were made during October 1990. A sample of 100 applications where a means assessment was undertaken was drawn for the purposes of analysis. Applications from persons who were on income support and who would therefore qualify for free legal aid were not included in this sample. The data extracted included information on household type, gross income, capital, allowances and contributions.

4. By way of background Table 1 compares the distribution of household types within the Scottish population with those in the means survey.

Table 1 Household types

Composition of household	Percentage of households ⁽¹⁾ FES	Percentage of Applicants Means Survey
Single adult	36	38
Lone parent	6	4
Couple, no children	29	14
Couple & 1 child	11	18
Couple & 2 children	13	14
Couple & 3+ children	6	12
All households	100	100

(1) Households which cannot be regarded as legal aid units are excluded.

Key results

(i) Spread of Gross Income

5. Table 2 shows the proportion of Scottish households falling in bands of gross income and the percentages of survey applicants falling into these bands. The data is based on FES 1988-89, which has been uprated to July 1990 prices, and on the means survey. As the FES data includes people on Income Support, the differences in the spread of gross incomes between the FES and the Means Survey may be underestimated.

Table 2 Gross Income

Gross normal annual income ⁽¹⁾ (£)	Percentage of households FES	Percentage of Applicants Means Survey
< 2570	6	14
2571 - 7100	29	38
7101 - 1300	21	37
13001 - 18500	17	9
18501 - 24500	12	2
24501 +	15	-
Total	100	100

(1) Incomes uprated to 1990 prices.

6. The FES data shows that more than half (56%) of Scottish households have a gross annual income of under £13,000; 15% have over £24,500. In contrast the means survey indicates that 89% of applicants for legal aid had a gross income under £13,000 and in particular, 52% had a gross income less than £7,100.

(ii) Eligibility

7. Table 3 shows how eligibility for legal aid, based on income alone, varies with gross income (uprated to 1990 prices). The percentage of households eligible for free and contributory legal aid and those which are ineligible have been estimated, based on disposable income, using the 1988-89 FES. The table suggests that about three-quarters of Scottish households are eligible for legal aid and over 4 in 10 are eligible for free legal aid.¹

Table 3 Gross Income and Eligibility for Legal Aid

Family Expenditure Survey 1988-89

Gross normal annual income ⁽¹⁾ (£)	Percentage of households eligible for legal aid			All Households	Number in Sample
	Free Legal aid	Legal aid with Contribution	Ineligible for Legal aid		
< 2570	100	0	0	100	66
2571 - 7100	89	11	0	100	309
7101 - 13000	30	66	4	100	222
13001 - 18500	18	62	19	100	175
18501 +	7	14	79	100	283
All income levels	44	31	25	100	1055

(1). Incomes uprated to 1990 prices.

¹These figures should be treated with particular caution since it is not possible to identify separately from FES data a number of the allowances taken into account in a legal aid assessment. As a result, the FES is probably over estimating the number of people who are eligible for legal aid.

8. Table 4 shows data on eligibility drawn from the small means survey:

Table 4
Gross Income and Eligibility for Legal Aid
Applicants for Non Matrimonial Civil Legal Aid

Gross normal annual income (£)	Percentage of households eligible for legal aid				All Households	Number in Sample
	Free Legal aid	Legal aid with Contribution	Ineligible ⁽¹⁾ for Legal aid (means)	Insufficient Information Available		
< 2570	100	0	0	0	100	14
2571 - 7100	71	8	5	16	100	38
7101 - 13000	35	41	14	11	100	37
13001 - 18500	11	11	67	11	100	9
18501 +	0	0	100	0	100	2
All income levels	55	19	15	11	100	100

Note

(1). The term ineligible for legal aid covers applicants who were refused on the basis of means.

9. Overall Tables 3 and 4 tend to indicate that under the present system gross income is not necessarily a good indicator of eligibility. The allowance system produces a wide range of gross income in which all three outcomes (free, contributory, ineligible) can occur.

(iii) Determinants of Eligibility

(a) Income

10. Of the 100 applicants in the means sample survey, 53% had an income from wages and salaries, 13% from self-employment and 35% from other sources including state benefits. On average, total allowances amounted to 63% of gross income. Allowances were made in 63% of the cases in the sample for tax and national insurance, in 89% for housing costs and in 81% for dependants' allowances. Given that tax is broadly related to income, the two key variable factors affecting eligibility are clearly the dependants' and housing allowances.

(b) Capital

11. 25% of the applicants in the means survey had capital resources. Only 2%, however, had disposable capital in excess of the free limit of £3,000. The source of capital in almost all cases was bank or building society deposits.

Contributions

12. 19% of the sample were eligible for contributory legal aid. In over 50% of these cases the contributions required were less than £500.

Costs

13. This section summarises the results obtained from a survey of paid non-matrimonial civil legal aid cases in Scotland. The main purpose of the survey was to identify problems of cost and the factors affecting them.

14. Data was collected on cases paid by the Scottish Legal Aid Board during October 1990. During that month 1,412 civil legal aid cases were paid, 1,042 of which were matrimonial and 370 non-matrimonial. The survey covered the 370 non-matrimonial civil cases² in which legal aid was granted to at least one of the parties. The information was drawn from the Scottish Legal Aid Board Accounts Department's computer and the analysis undertaken by The Scottish Office Central Research Unit.

15. The analysis concentrated on the following main areas:

- a. the pattern of gross costs of cases. The gross cost is the full, final legal aid expenditure for the case, before any recoveries or interim payments made are deducted. It does not include any pre-certificate expenditure.

²For the purpose of the survey non-matrimonial was taken to cover the following types of action: affiliation and aliment, adoption, reparation, and other, including diligence.

b. how the cost was met: awards of expenses, contributions, principal sum³, legal aid fund.

16. The analyses revealed a few limitations to the data held. The Accounts Department files held no information on the amounts of principal sums or on the actual payment of contributions. As a result it was not possible to analyse the net cost of cases as both contributions and principal sums contribute towards the cost of cases.

Key results

(i) Spread of costs

17. Table 5 shows the number and percentage of cases falling in bands of gross cost and the proportion of the total gross costs that the cases in each band represent. The cost was less than £1,000 in 75% of all cases, with nearly 60% under £500. The average cost of a case was £1,069. 5% of the cases (18 out of 370) accounted for 42% of total gross cost.

Table 5

Spread of Costs

Cost of case (£)	Number of cases	Percentage of cases	Total gross cost (£)	Percentage of total gross cost
< 500	218	59	40422	10
501 - 1000	59	16	41120	10
1001 - 1500	33	9	39111	10
1501 - 2000	13	4	22573	6
2001 - 2500	12	3	26896	7
2501 - 5000	17	5	58422	15
5001 - 10000	13	4	96476	24
10001 - 25000	5	1	70423	18
25001 +	0	0	0	0
Total	370	100	395443	100

³ A principal sum may be awarded by the court or agreed between parties in order to make good a civil wrong, that is to compensate for injury, harm, or loss to a person or property as a consequence of the fault of another.

(ii) Factors affecting gross cost of a case

(a) Type of court

18. Not surprisingly, Court of Session cases tended to be more expensive than Sheriff Court cases. The average cost was £2,075 for the Court of Session and £563 for Sheriff Court cases. 87% of Sheriff Court cases and 54% of Court of Session cases cost less than £1,000.

Table 6

Type of Court

Cost of case (£)	Court of Session		Sheriff Court	
	Number of cases	Percentage of cases	Number of cases	Percentage of cases
< 500	13	37	158	73
501 - 1000	6	17	31	14
1001 - 1500	5	14	10	5
1501 - 2000	2	6	4	2
2001 - 2500	0	0	8	4
2501 - 5000	5	14	3	1
5001 - 10000	3	9	3	1
10001 - 25000	1	3	0	0
25001 +	0	0	0	0
Total	35	100	217	100

(b) Type of litigant

19. In a number of cases the type of litigant was not known. In cases where the type of litigant was known, cases in which the legally aided party was the pursuer tended to cost more than those in which the assisted party was the defender. The average gross cost was £949 and £606 respectively. The proportions under £500 were 68% and 63%.

Table 7

Type of Litigant

Cost of case (£)	Pursuer cases		Defender cases		Other cases		Not known cases	
	number	percentage	number	percentage	number	percentage	number	percentage
< 500	101	68	44	63	26	76	47	40
501 - 1000	18	12	14	20	5	15	22	19
1001 - 1500	7	5	6	9	2	6	18	15
1501 - 2000	5	3	1	1	0	0	7	6
2001 - 2500	6	4	2	3	0	0	4	3
2501 - 5000	4	3	3	4	1	3	9	8
5001 - 10000	6	4	0	0	0	0	7	6
10001 - 25000	1	1	0	0	0	0	4	3
25001 +	0	0	0	0	0	0	0	0
Total	148	100	70	100	34	100	118	100

(c) Type of proceeding

20. Gross cost appears to vary in relation to the nature of the proceedings. Table 8 shows that reparation cases are the most expensive and adoption the least. It also shows the proportions of cases below £1,000 and £500 for each category.

Table 8

Type of Proceeding

Type of Proceeding	Number of cases	Average cost per case (£)	Percentage of cases costing <£500	Percentage of cases costing <£1000
Affiliation & Aliment	30	831	60	80
Adoption	25	207	80	100
Reparation	127	1920	35	54
Other (including Diligence)	192	646	72	85
Total	374	1069	59	75

(d) Result

21. Of the 370 cases in the sample, 59% were won, 10% lost and 22% were abandoned⁴. Losing cases (average £2,372) appear to be more expensive than winning (£1,211) or abandoned cases (£503).

⁴Won and lost covers cases where a judgment was given by the court in favour or against the assisted person. Abandoned includes all cases where an agreement was reached between the parties, whether before or during proceedings.

(e) Length

22. The average case length was 1 year and 8 months⁵. In 33% of cases the length of cases could not be calculated. In cases where length was known 39% took less than a year and 86% were completed within 3 years. Table 9 shows the distribution of case lengths, the average gross cost by length and the average cost per month. It suggests that case cost increases fairly steadily with length.

Table 9 Length of Case

Length of case	Number of cases	Percentage of cases	Percentage of known cases	Average cost per case (£)	Average cost per month (£)
< 6 months	20	5	8	163	35
6 months - 1 year	75	20	30	320	37
1-2 years	83	22	34	597	35
2-3 years	34	9	14	626	21
3-4 years	13	4	5	1667	40
4-5 years	11	3	4	3003	56
5-6 years	11	3	4	3355	52
6 years or more	0	0	0		
Unknown	123	33		34	
Total	370	100	100	1069	

⁵The length of case was taken as the time from the effective date of the legal aid certificate to payment of the final account. Given that the date of decree or settlement was not available, this period approximated to the length of the legal case proper. It excluded any time for enforcement of expenses or contributions before the legal aid case could be paid.

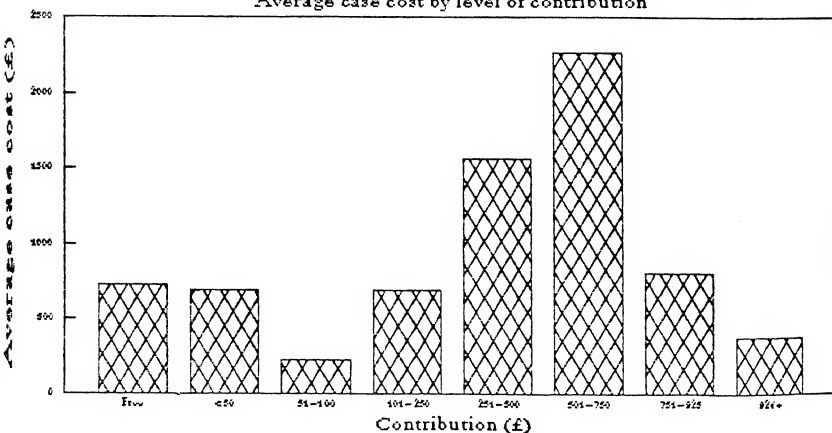
23. The gross cost of cases was analysed by the size of the assisted person's assessed contribution in cases in which information on the means decision and contributions was known. 83% of these cases (205) qualified for free legal aid. The average gross cost of free cases was £725 compared with £1,105 for contributory cases. Table 10 illustrates that there was no consistent cost pattern within the contributory range.

Table 10 Contributions

Contribution (£)	Number of cases	Percentage of known cases	Average cost per case (£)
Free	205	83	725
< 50	4	2	684
51 - 100	4	2	223
101 - 250	11	4	690
251 - 500	13	5	1557
501 - 750	5	2	2265
751 - 925	4	2	806
926 +	1	0	387
Not known	123		
Total	370	100	1069

NON MATRIMONIAL CIVIL LEGAL AID

Average case cost by level of contribution



(iii) Factors affecting net cost of a case

24. The various sources of payment to meet the cost of legal aid cases - the legal aid fund, awards of expenses, contributions and principal sums - were examined. In 37% of all cases in the sample an award of expenses was made, in 25% of cases there was a principal sum and in 11% of cases there was a contribution. Overall, 51% of the total gross cost of all the cases in the sample was met by awards of expenses. No information was available as regards the amounts of principal sums or in relation to the amount of contributions actually paid.

25. In 50% of cases in the sample the legal aid fund met all of the gross cost as there were no awards of expenses, contributions or principal sums.

Table 11

Source of Costs

Type of Proceeding	Number of cases	Average cost per case	Cases wholly paid for by Legal Aid Fund	
			Number	Percentage
Affiliation & Aliment	30	831	19	63
Adoption	25	207	24	96
Reparation	127	1920	41	32
Other (including Diligence)	188	646	100	53
Total	370	1069	184	50

26. The survey indicated that expenses were not awarded in favour of a significant proportion of apparently successful assisted litigants. Expenses were not awarded in 75 of the 211 won cases (36%). Table 12 shows the number and percentage of cases in various categories which were won, and the number and proportion of these cases where expenses were awarded.

Table 12

Cases won

	Number of cases	cases won		cases won with expenses awarded	
		Number	Percentage	Number	Percentage
Type of Proceeding					
Affiliation & Aliment	30	17	57	10	59
Adoption	25	22	88	0	0
Reparation	127	80	63	66	83
Other (including Diligence)	188	92	49	60	65
Type of Court					
Court of Session	35	9	26	3	33
Sheriff Court	218	112	51	56	50
Unknown	115	90	78	77	86
Type of litigant					
Pursuer	149	70	47	47	67
Defender	70	24	34	10	42
Other	34	27	79	2	7
Unknown	115	90	78	77	86
Average cost per case					
< 500	218	110	50	59	54
501 - 1000	59	40	68	27	68
1001 - 2500	58	40	69	31	78
2501 - 5000	17	8	47	7	88
5001 +	18	13	72	12	92
Total	370	211	57	136	64

Contributions

27. A contribution was assessed in 42 of the 370 cases in the sample (11%). The average contribution assessed was £372. No information was available from the data surveyed on whether payment of the contribution was made in all these cases, to what extent actual contributions were reduced or whether any contributions were written off.

28. In a significant proportion of cases the maximum assessed contribution exceeded the eventual gross cost. It was estimated that this applied to about 10 out of the 38 contributory cases in which there was a gross cost (26%).

**SURVEY OF APPLICATIONS REFUSED
AND ABANDONED**

Introduction

1. In 1989-90 SLAB received 29,527 applications for civil legal aid (matrimonial and non-matrimonial actions). Of these applications, 18,565 (62%) were granted legal aid (some free and some with contributions) at the first instance. In the remaining 10,962 cases, legal aid was not granted at the first instance. Table 1 shows the various reasons why civil legal aid was not granted or was abandoned and the number and proportion of cases in each category.

Table 1 Civil Legal Aid Applications: 1989-90

<u>Reason for refusal/abandonment</u>	<u>Cases</u>	
	<u>Number</u>	<u>Percentage</u>
Refused: unreasonable case (merits)	3,792	13
Refused: applicant's income and/or capital (means)	1,093	4
Abandoned: before offer of legal aid	4,699	16
Abandoned: at offer of legal aid	1,378	5
Total refused/abandoned	10,962	38
Total applications	29,527	100

2. As Table 1 shows, in approximately 25% of the total applications for civil legal aid in 1989/90, the application was either refused by SLAB for financial reasons or abandoned by the individual before or at an offer of legal aid. As part of the review in Scotland research was undertaken by the Legal Studies Research Branch of The Scottish Office Central Research Unit to examine these cases in more detail.

Research Design

3. 1,915 non-matrimonial civil legal aid applications, assessed by SLAB between October 1988 and August 1990 were refused on means or abandoned before, at or after offer. A random sample of 354 of these applications (approximately 1 in 5) was extracted from files and the applicants were then followed up by a postal questionnaire survey. 145 individuals (41%) responded to this questionnaire. The preliminary results of this survey are discussed below. Follow-up interviews with a

small sample of applicants are currently being undertaken to pursue further the reasons why they took a particular course of action.

4. The main sample consisted broadly of 4 different types of application:

(a) Refused on means (120 applications)

Cases in which the SLAB had refused civil legal aid because the applicant's disposable income and/or capital exceeded the upper financial eligibility limits.

(b) Abandoned before offer (150 applications)

Cases in which the legal aid application was abandoned because the applicant failed to supply sufficient financial information to enable the SLAB to assess his eligibility or the applicant withdrew his legal aid application for some other reason.

(c) Abandoned at offer (55 applications)

Cases in which the applicant was offered legal aid by the SLAB but failed to sign and return the offer or did sign the offer but did not pay the first instalment of the contribution and the legal aid certificate was terminated.

(d) Abandoned after offer (29 applications)

Cases in which the applicant took up legal aid as offered by the SLAB but the legal aid certificate was later terminated for various reasons, for example failure to pay contributions, means re-assessment etc.

Main Findings

(i) General characteristics

5. The research sample (total 354) included more males (229) than females (125) and more pursuers (238) than defenders (110). There were

also more sheriff court cases (293) than Court of Session cases (50)¹. The cases examined were mainly personal injury/accident actions, debt/payment actions or miscellaneous actions, with a small number of damages and medical negligence actions.

¹Numbers do not always total 354 because in a small number of cases the litigant or court was other than the main type, eg petitioner, Scottish Land Tribunal.

(ii) Outcomes

6. Financial refusals of legal aid by SLAB were mainly on the basis of applicants' disposable income (102 cases) rather than disposable capital (18 cases).

7. Abandonment of applications before an offer of legal aid was made was largely as a result of applicants failing to supply sufficient financial information to SLAB (139 cases), rather than the applicant withdrawing their application (11 cases).

8. In the majority of cases which were abandoned at offer the applicant failed to sign and return the letter of undertaking to SLAB. In a small number of cases the offer was accepted but later abandoned because the individual failed to pay the first instalment of the contribution.

9. Abandonment of legal aid after an offer had been accepted was mainly because of the failure of the assisted person to pay the contribution.

Table 2 Sample of applications refused or abandoned: 1988-90

	<u>Total Cases</u>		<u>Responses to</u>	
	<u>Examined</u>		<u>Questionnaire</u>	
	<u>Nos</u>	<u>%</u>	<u>Nos</u>	<u>%</u>
Refused	120	34	66	46
Abandoned before offer	150	42	41	28
Abandoned at offer	55	16	29	20
Abandoned after offer	29	8	9	6
Total	354	100	145	100

(iii) Reasons for abandonment of legal aid application

10. Table 2 shows that survey respondents who abandoned their application before legal aid was offered (41) gave a number of reasons for failing to send SLAB sufficient financial information for the assessment of means. These included:

- a. that the legal problem had been dealt with or was not important enough to warrant continuing with the application;
- b. realisation that they would fall outside the financial limits of the scheme;
- c. that the application process was too complicated and time-consuming.

11. Of the 29 survey respondents who refused an offer of legal aid about half (14) felt the level of contributions was too high.

12. Of the 9 survey respondents who accepted an offer of legal aid but subsequently abandoned it, approximately half (5) subsequently defaulted on the payment of the contribution.

(iv) Dealing with a legal problem without legal aid

13. Table 3 shows that nearly one quarter (23%) of those survey respondents who were assessed to fall outwith the upper eligibility limits subsequently proceeded with legal action at their own expense. The remainder (77%) did nothing further, settled out of court or reapplied for legal aid. Approximately one third of this group indicated that they felt they could not afford to proceed at their own expense.

Table 3: Action taken by survey respondents who were refused legal aid

<u>Action</u>	<u>Number</u>	<u>Cases</u>
		<u>Percentage</u>
Did nothing further	18	27
Out of court settlement	19	29
Paid for solicitor	15	23
Reapplied for legal aid	8	12
Other	6	9
Total respondents	66	100

14. Table 4 shows that 24% of the 41 survey respondents who abandoned their legal aid application by failing to supply financial information subsequently paid for a solicitor to represent them in court. A further 56% of this group of respondents (23) did nothing further about their

legal problem or settled out of court. The main reason given by the latter group (11 out of 23 individuals) was the perceived cost of legal services.

Table 4: Action taken by survey respondents who abandoned their application

<u>Action</u>	<u>Number</u>	<u>Cases</u>
		<u>Percentage</u>
Did nothing further	12	29
Out of court settlement	11	27
Paid for solicitor	10	24
Reapplied for legal aid	8	20
Other	0	0
Total respondents	41	100

15. As Table 5 shows, there were 29 survey respondents who were offered legal aid but did not accept it. 83% (24) of these respondents took no further legal action or settled the matter out of court. 12 of these indicated that they had not accepted the offer of legal aid because they felt they could not afford the legal aid contributions and that without legal aid they felt they could not afford to proceed privately. 2 respondents proceeded by paying for a solicitor.

Table 5: Action taken by survey respondents who did not accept the offer of legal aid

<u>Action</u>	<u>Number</u>	<u>Cases</u>
		<u>Percentage</u>
Did nothing further	14	48
Out of court settlement	10	35
Paid for solicitor	2	7
Reapplied for legal aid	1	3
Other	2	7
Total respondents	29	100

16. Finally, Table 6 shows that there were 9 survey respondents who accepted an offer of legal aid but later defaulted on their contribution payments. Of these, 7 did nothing further about their legal problem or settled the matter out of court and 2 reapplied for legal aid. No one in this group paid for a solicitor privately.

Table 6: Action taken by survey respondents whose legal aid certificate was terminated

<u>Action</u>	<u>Number</u>	<u>Cases</u> <u>Percentage</u>
Did nothing further	4	45
Out of court settlement	3	33
Paid for solicitor	0	0
Reapplied for legal aid	2	22
Other	0	0
Total respondents	9	100

Summary

17. Table 7 summarises the various courses of action taken by respondents of all types to deal with their legal problem without legal aid. Overall 19% of respondents proceeded with legal action at their own expense, after legal aid had been refused or abandoned, 33% did nothing further and 30% settled out of court.

Table 7: Action taken by survey respondents

<u>Action</u>	<u>Number</u>	<u>Cases</u> <u>Percentage</u>
Did nothing further	48	33
Out of court settlement	43	30
Paid for solicitor	27	19
Reapplied for legal aid	19	13
Other	8	5
Total respondents	145	100

18. As indicated at paragraph 3 above, follow-up interviews are currently being conducted with a sample of respondents to explore more fully the reasons they took a particular course of action.

LEGAL EXPENSES INSURANCE

1. This Annex describes in general terms the features of the legal expenses insurance (LEI) currently available in the UK. The market is, however, changing rapidly and the policies and approaches of individual insurers may vary somewhat in detail.

Background

2. LEI can be purchased, for an annual premium, by individuals or groups. It provides funding if the individual or his family subsequently become involved in legal proceedings of a type covered by the policy. Most insurers, however, will only support cases which have a reasonable prospect of success and there is usually a maximum level of indemnity. Subject to the limit, most policies also cover opponents' expenses if the insured is ordered to pay these.

3. LEI is still a relatively new product in the UK. It first appeared in 1974, although the personal/family market has grown up only over the last decade. The first "add-ons" to other insurance were sold in 1979 and the first telephone legal advice line appeared in 1980. The market remained small for most of the 1980s, although growth has been more rapid in recent years.

4. The Association of British Insurers has estimated that total premiums are now worth about £40-50m pa, which represents a 100% increase in the last two to three years. This is divided between 50% motor related LEI, 20% general family policies and 30% commercial. About 10 million people have some form of cover, although in many cases this is restricted to access to a telephone advice line. The Consumers' Association/Law Society survey suggested that about 7% of the population had some form of LEI proper; this compares with an earlier, and possibly out of date, industry estimate of 2%.

5. LEI is subject to "The Insurance Companies (Legal Expenses Insurance) Regulations 1990" (SI 1990/1159) implementing EC Directive 87/34, which came into force on 1 July 1990. The Regulations provide for the separate management of LEI from other insurance business in order to

prevent conflicts of interest. They also require a free choice of lawyer to conduct any legal proceedings and a right to arbitration in the event of a dispute with the insurer.

Types of policy

6. There are two main types of LEI, "add-on" and "stand alone".

a. Add-on policies are purchased as supplements to existing motor or home contents insurance and are usually limited in scope.

i. motor policies cover uninsured loss recovery and injuries received in motor accidents. The typical premium is £5-£10.

ii. all home contents policies cover consumer disputes about goods and services and personal injury. Many also include other categories, such as employment matters. Most cost an additional £7.50 to £15.

b. Stand alone policies are more expensive but offer wide cover. They currently cost an individual between £85 and £150 pa, but can also be bought more cheaply on a group basis, for example by an employer for his employees.

Limitations

7. Most policies exclude matrimonial disputes. Many also exclude building disputes, defamation, tax matters and defence of criminal prosecutions involving violence. Home contents add-ons often exclude motoring-related matters.

8. Policies are subject to a maximum indemnity limit which covers both own and opponents' legal expenses in the relevant classes of case. This is usually £25,000 to £50,000. Some include an excess of between £10 and £50.

9. There is usually a minimum value of claim although these tend to be very low (mostly between £50 and £125). All are below the current small claims limit of £750.

10. Disputes arising before the policy was taken out are not covered. Some exclude certain categories of claim in the first few months after a policy is taken out. Many include a time limit within which claims must be reported.

11. Insurers operate a type of merits test before accepting a claim for a civil case. This is usually expressed in terms of "reasonable prospects of success". Most insurers also retain the right to withdraw cover if a reasonable settlement is unlikely to be obtained or if the insured does not accept a reasonable offer.

12. If proceedings are taken, the EC Directive now requires insurers to allow their insured a free choice of solicitor. Most companies reserve the right to reject the client's nomination. One company nominates a solicitor itself though the insured person can object to this choice. The extent to which insurers can reject nominations or direct choice under the Directive has yet to be tested in the courts.

13. Some companies argue that it is essential to use only tried and tested firms of solicitors if LEI is to remain profitable. Such firms are known to be competent while insurers are able to negotiate favourable charging rates by concentrating their business.

The major companies

14. LEI can be purchased from a rapidly increasing number of insurance companies, other financial institutions and brokers. The Consumers' Association/Law Society survey identified 28 companies offering add-ons to home contents insurance and 27 to motor policies; the latter are also sold by many brokers. Few of these institutions, however, write their own policies, most acting as the intermediaries of a few specialist LEI firms. The recent growth in the market is largely the result of selling LEI in the name, and to the customers, of established financial institutions.

15. The LEI specialists write and manage policies but do not usually underwrite them themselves. The underwriter is usually either the larger insurance company of which the LEI firm is a subsidiary, the intermediary company in whose name the policy is sold, or Lloyds syndicates. The

underwriters often delegate the authority to pay a claim. They may themselves reinsure against large cases.

MEANS ASSESSMENTIntroduction

1. Chapter 6 (paragraphs 24-30) considered the issue of means assessment in general terms. It concluded that there was considerable scope for simplifying the existing procedures, because the arbitrary elements in determining the level of eligibility and contributions meant that complexity and detail could achieve only a spurious accuracy. This Annex considers the possible simplification of the existing system of means assessment, particularly in the context of a safety net legal aid scheme. Many of the proposals could, however, be adopted with advantage in any system requiring means assessment.
2. Under a safety net scheme, it would be highly desirable to avoid the need for an initial assessment for every potential user of the safety net. The aim should be for prospective litigants to be able to assess their own spending limit with tolerable accuracy.
3. Under the proposed approach, litigants would determine the value of their capital resources and their annual disposable income net of certain expenses and allowances. The necessary information should be readily accessible and the subsequent calculations straightforward. The Scottish Legal Aid Board would publish tables showing the appropriate spending limits for various bands of capital and disposable income; these would incorporate the effects of a sliding scale for the contributory fraction. As now, the solicitor would normally assist the litigant with his application.
4. On commencing to act, the solicitor would record the date and the litigant's spending limit. This would provide a record of the capital held at that time, although it would remain difficult to detect deliberate deprivation before the litigation had begun. The solicitor would also ensure that the proofs of income and allowances (eg statement of earnings from an employer), which would be necessary in the event of a later application for safety net legal aid, were available.
5. The rest of this Annex considers:

- a. the period on which litigants would base their calculation of income. This could be prospective, as at present, or retrospective;
- b. how litigants would determine their resources, how their statements would be verified, and whether there is a need to simplify the system by allowing litigants to disregard certain types of income or capital; and
- c. which of the current allowances should be (i) disregarded, (ii) standardised or (iii) retained as specific allowances which individuals would need to calculate for themselves.

Computation period

6. At present the Scottish Legal Aid Board are required to assess the income which an applicant can expect to receive in the twelve months following the date of application and the capital he possesses at that date. In practice, however, much of the assessment is based on the applicant's statement of his current weekly or monthly income and expenditure, adjusted for any anticipated changes in future circumstances, eg birth of a child.

7. Any further significant change of circumstances during the computation period requires a reassessment to be conducted.

8. It is likely to be easier for litigants to calculate their spending limit using actual figures. A retrospective computation period should therefore be adopted. It is proposed that litigants should calculate their income for the year ending on or about the date when their case commences. This should then be deemed to reflect their ability to pay a contribution (or spending limit) during the subsequent first year of the case.

9. A retrospective computation period would increase the likelihood of circumstances changing while the contribution was being paid. There are two possible ways of dealing with this. The first would be to eliminate reassessments altogether. In other words, the contribution would be in respect of past income from the period actually assessed. Most litigants, however, would not anticipate a legal action a year in advance and

therefore might no longer be able to pay, having committed their income in some other way.

10. The alternative is to take account of significant changes of circumstance during the lifetime of a case. A capital windfall over a given limit could readily be added to the spending limit as the case progressed. Income reassessment could, however, be more complex if litigants had to recalculate their spending limit frequently in respect of different annual computation periods. Further work will be done to consider the degree of change which needs to be taken into account (eg loss of job) and the mechanism for doing so.

Continuing contributions

11. Chapter 8 argues (paragraphs 20-21) that it would be unreasonable to require litigants to make a further computation each year and add the result to their spending limit but that contributions should continue under legal aid, once a spending limit based on one year's income had been reached. To reduce administration the Scottish Legal Aid Board would usually order a contribution based on the original income spending limit uprated for inflation; the litigant would be required to declare any changes of circumstance above certain limits. The order would be back-dated or post-dated, so that legal aid contributions became due from the first anniversary of the case beginning, thus corresponding to a further notional annual assessment period.

Sources of means and allowances

12. This section examines the various sources of income and capital and the allowances against each, currently recorded by the Scottish Legal Aid Board. For each, it considers whether items make a significant difference to the outcome of assessments and the ease of self-assessment and subsequent verification. Items of low value or which arose only rarely would be disregarded. Substantial but predictable factors could be standardised as part of the contribution calculation.

Verification

13. All means tests rely to a large degree on full and honest declaration by applicants. The temptation to conceal may be greater with a self-assessed system. Proof could be required in every case for income from employment or relevant state benefits and for any allowances claimed. There would, however, inevitably be scope to conceal capital or types of income which do not appear in every case (eg interest, rent from lodgers). There are two possible approaches. All cases could be subject to a detailed official means assessment at the time of application for legal aid; if necessary, the spending limit could be adjusted or legal aid refused. Alternatively, it may be sufficient to rely on a well-publicised procedure for investigating a random sample of applicants in detail, possibly leading to prosecution for fraud. On balance it may be more appropriate that a substantial benefit which affects third parties should not be granted without an external check on means in each case.

Sources of income

14. The current procedure looks at all an applicant's resources. Some income is subsequently disregarded. Certain state benefits are disregarded by statute. Discretionary disregards cover other similar benefits, a proportion of a student grant and other minor items. With a self-assessment system, applicants would be instructed to disregard specified items.

15. Wages/Salaries. Most applicants should have little difficulty in identifying their earnings (including sick pay etc) for the previous year. They would subsequently need to produce proof of earnings, preferably in the form of a statement from their employer similar to the existing Form L17, and/or proof of unemployment during periods for which no earnings are declared.

16. Income from self-employment. Business assessments are more complex. They are currently performed by specialist Scottish Legal Aid Board teams. Self-assessment would have to be based on the latest set of certified accounts. It would seem preferable, however, to retain an initial assessment by the Scottish Legal Aid Board in such cases.

17. Benefits. The various types of state benefit can be considered in four categories:

a. income support already entitles the recipient to automatic free legal aid.

b. benefits paid in lieu of normal earnings (unemployment benefit, sickness benefit, maternity allowance) should be declared, as should longer term equivalents (such as invalidity benefit or state retirement pension). A statement of benefit paid should be provided.

c. certain benefits (including Child Benefit which is not means tested) are granted in respect of specific commitments. The effect of these could be offset in the relevant allowances. The allowances for dependent children would be net of Child Benefit. Applicants would declare housing costs net of any housing benefit received.

d. benefits paid in special cases (eg mobility allowance, social fund payments) would be disregarded.

18. Investment income. This is a relatively minor factor at present. In most cases, interest would represent an additional calculation for the litigant, but make little material difference. It may, however, be more significant for some of the richer applicants who could apply to a safety net. Such cases could be brought in without troubling the majority of litigants by setting a fairly high minimum level to be declared.

19. Benefits in kind. The Scottish Legal Aid Board calculates two main types of benefit in kind:

a. Company cars. The taxable value of this benefit is readily identified from Inland Revenue form P2.

b. Food and heating. An arbitrary addition is made to income to counteract the effect of allowing payments for board and lodging which include food and heating (see paragraph 27 below).

20. Other income. This category includes all other types of income recorded by the Scottish Legal Aid Board. The significant items, which should be specifically listed in the instructions to litigants, are private pensions, maintenance payments, rent from lodgers or tenants, income from trusts and educational grants. Other minor sources of income would be disregarded.

21. Spouse's income. This is a major factor in existing applications. Applicants would be required to provide proof of their spouse's employment status and earnings as well as their own and declare their other relevant income.

Sources of capital

22. Capital plays a fairly limited role in existing applications for legal aid. Some potential users of the safety net could, however, have significant amounts of capital which it would be necessary to take into account.

a. Most capital takes the form of deposits and shares. Litigants should have little difficulty since these have a known financial value at any given time.

b. Valuables and other property. These could be disregarded or litigants could be asked to declare a value for specified types of item: second homes, second cars, jewellery, artwork. A professional valuation or the insured value could be used.

c. Insurance policy loan values. These can be difficult to determine and few companies now give them. Moreover, loan values rarely effect the outcome of an assessment. They should therefore be disregarded.

d. Loan value of business. These require detailed treatment (see paragraph 16 above).

e. Reversions and money owed. The current rules require the Scottish Legal Aid Board to estimate likely receipts during the computation period. These count as capital whether they are

actually received or not. Safety net litigants could be required to add money actually received after the start of a case to their spending limits.

Allowances

23. Chapter 6 (paragraph 27) identified two possible ways of defining the expenditure commitments for which an allowance should be made. In either case, specific allowances should only be necessary for items which tend to be sufficiently large to have a significant effect on outcome and of sufficiently varied size or incidence to preclude standardisation. The free limit and the contributory fraction should be deemed to allow for all other expenditure.

24. The various allowances which are currently made are discussed below. The most significant, in terms of affecting the outcome for an application, are housing expenditure and dependants.

25. Taxes. Applicants would determine their income net of tax and National Insurance. Local Government taxation would also be allowed.

26. Dependants. Standard allowances for spouse and each child could readily be subtracted by the applicant, although the number of age bands might be simplified. The status/age of the dependant would be as at the start date of the case. Where regular maintenance was paid to non-resident relatives, the actual amount paid during the computation period could be subtracted.

27. Housing. Chapter 6 (paragraph 27) discussed the alternative approaches to housing expenditure. If actual expenditure was allowed, applicants would need to provide proof of their rent or mortgage and water rates. Those whose rent included food and heating would need to deduct a fixed proportion of the rent to reflect this.

28. Employment expenses. These include travel, Trade Union and professional fees and superannuation contributions. The last are usually deducted at source but the others could prove difficult for applicants to calculate and prove. A standard deduction from earned income could be

made or travel to work and membership fees could be deemed to be covered by the contributory fraction.

29. Discretionary allowances against income. Discretionary allowances are not consistent with the narrower definition of allowable items (Chapter 6, paragraph 27a) since they generally relate to expenditure commitments that the applicant could have chosen not to make. In any event, discretions could clearly not be self-assessed; nor are they consistent with a retrospective computation period, since they do not refer to non-recurring items. Most discretionary items should therefore be abolished under a simplified system.

30. The main categories in which the Scottish Legal Aid Board exercises its discretion are:

a. certain hire purchase and loan repayments. General credit repayment is deemed to be covered by the free limit but is allowed for home improvements, some house purchases (see (d) below) and in cases of hardship.

b. debts: primarily arrears in respect of rent, mortgage utilities and credit.

c. school fees.

d. upkeep of second homes is allowed where there is good reason for having two homes, for example, the applicant works a considerable distance from the family home.

e. retirement policy premiums paid by the self-employed etc. As with other superannuation payments, these should continue to be allowed.

31. Capital allowances or disregards. The circumstances under which capital set aside for other purposes might be disregarded should be made explicit. This should reflect the approach taken to income allowances. Under a self-assessment system, litigants could make an initial application (see Chapter 8, paragraph 9) to claim such an allowance.

Conclusion

32. A simplified system of means assessment should allow litigants to calculate accurately their eligibility for legal aid and/or their safety net spending limit. In essence, they would consider their annual earnings net of tax, housing expenditure and dependants' allowances. A number of other factors which are currently taken into account would be standardised or disregarded.